

COMPETITION AND THE FUTURE OF DIGITAL MUSIC

HEARING BEFORE THE ANTITRUST TASK FORCE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED TENTH CONGRESS FIRST SESSION

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COMPETITION AND THE FUTURE OF DIGITAL MUSIC

WEDNESDAY, FEBRUARY 28, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Task Force met, pursuant to notice, at 3:05 p.m., in Room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Task Force) presiding.

Mr. CONYERS. Good afternoon.

The first hearing of the Antitrust Task Force for the 110th Congress will come to order.

I welcome all of our Members, especially our Ranking Member, Steve Chabot of Ohio, who will be joining us momentarily.

The very first hearing of our Antitrust Task Force involves a discussion of the issue of competition in digital media as exemplified by the proposed merger of Sirius and XM Radio.

We come to this hearing with an open mind. But we recognize that the companies have the obligation to convince the Congress, the regulators and, most importantly, the American people, that this combination will improve the competitive playing field and benefit consumers.

And so, here are the concerns I would like to lay on the table.

The critical issue in this hearing to me is whether the relevant market is all forms of digital music and retail music and radio, or simply satellite radio. Proponents of the merger would note that the retail music industry exceeds \$12 million in annual revenue, includes more than 230 million people who listen to ordinary radio, and 50 million people who listen to Internet radio, more than 100 million iPods are going around the country, but yet there are 14 million satellite radio subscribers.

If we are to define the market as broadly as merger supporters advocate, what sort of precedent are we setting for other businesses?

Now, several commentators have suggested that the reason this deal is being pushed is that the present Administration's appointees will be able to give their approval before the next election.

Excuse me for being so candid about this consideration. And from at least one perspective, this merger can be said to turn a duopoly into a monopoly circumstance.

And, finally, my concern is about the potential for non-interoperability of competing technologies. How are we going to ever get the consumers who have already purchased equipment for either XM or Sirius to be able to use the equipment in a post-merger world?

These consumers could be left high and dry and there could be complications that we hope to examine about how this could be made technologically smooth.

I look forward to a full and frank discussion with our distinguished witnesses and urge that we all be as concerned as we can for the public interest issue that overlies this hearing.

Our witnesses are David Rehr, the president and CEO of the National Association of Broadcasters. Our next witness, Ms. Gigi Sohn, president and founder of Public Knowledge, a nonprofit public interest organization that focuses on issues involving intellectual property as it applies to the communications sector. Our third witness is Mark Cooper, director of research at the Consumer Federation of America, who has testified on numerous occasions about communications and media matters. Our fourth witness is Mr. Charles Biggio, partner of a very prominent firm and who has himself served as Deputy Assistant Attorney General in the Antitrust Division in earlier Administration. And finally, Mr. Mel Karmazin, CEO of Sirius Satellite Radio, previously president of Viacom.

And since our Ranking minority Member has been unavoidably detained, I now recognize the full Committee Ranking Member, Mr. Lamar Smith of Texas.

Mr. SMITH. Thank you, Mr. Chairman.

Let me just augment what you have said. The Ranking Member of the Task Force, the gentleman from Ohio, Mr. Chabot, has been detained at the House Administration Committee where he is testifying on behalf of the Small Business Committee, that he is also Ranking Member of. So that is the reason for his absence.

And in his absence, I too want to thank you for convening this first hearing of the Antitrust Task Force.

Vigorous, unimpeded competition sustains our economy and keeps it strong. It leads to innovative products that better our lives and keep prices low. The Judiciary Committee has a long history of oversight to ensure that American markets retain healthy competition.

This hearing gives us the opportunity to examine one of the newest technologies emerging in our economy. In the last decade, the options for receiving music, sports, news and other programming have increased dramatically. Consumers also have the choice of two satellite radio companies, XM and Sirius. These companies provide hundreds of channels of unique programming options to millions of customers nationwide.

Listeners have access to numerous choices in music, news, sports and talk programming that would have been unimaginable even 10 years ago. Often these programming options come without commercial interruption and without the content restrictions that exist on terrestrial radio.

Now those two companies have announced that they want to merge. They argue that a combined company would allow them to compete more effectively against broadcast radio, the Internet and a number of emerging technologies. They argue that efficiencies in the merger will allow them to provide even more choice to consumers at a competitive choice.

Critics of the merger contend that this will reduce the number of satellite radio offerings from two to one and that approval of the

merger would amount to a Government-sanctioned monopoly. They further argue that this merger would allow the combined XM-Sirius to raise subscription prices to consumers without providing any new or innovative services for those higher prices.

Mr. Chairman, it is important we not prejudge the proposed merger. We are at the beginning of a very long process. Both the Federal Communications Commission and the Department of Justice will review this proposal. I trust that both the FCC and the DOJ will do a thorough job of reviewing the evidence and will also take into consideration the oversight findings of this Task Force.

With that in mind, Mr. Chairman, I too look forward to listening to our witnesses and I yield back the balance of my time.

Mr. CONYERS. Thank you very much, Mr. Smith, for stepping in in such a timely fashion.

We will accept all other opening statements to be inserted in the record, without objection.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, ANTITRUST TASK FORCE

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CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT BEFORE THE

COMMITTEE ON THE JUDICIARY
ANTITRUST TASK FORCE

OVERSIGHT HEARING:

**"COMPETITION AND THE
FUTURE OF DIGITAL MUSIC"**



FEBRUARY 28, 2007

Mr. Chairman, I move to strike the last word.

Thank you, Mr. Chairman for holding this oversight hearing.

Let me also thank the Ranking Member and all the members of the
Task Force for volunteering to serve on this very important Antitrust

Task Force. After all, the law of antitrust is the law of fair competition. The continued vitality of our nation's economic system depends upon fair and vigorous competition. This has proven to be the best and most effective way of ensuring innovation, improving quality, reducing prices, widely distributing goods and services throughout the population, and turning the diversity of the nation into its greatest strength and asset. I am therefore very pleased to be a member of this Task Force. I strongly believe that working together, we can achieve great things for the American people.

Mr. Chairman, technological developments are dramatically changing the ways in which consumers can obtain music. In addition to the traditional offerings of broadcast radio and record stores, consumers can choose from digital music delivered via the Internet or satellite, as well as by broadcast or compact disc and other "hard copy" formats.

The recently announced merger plans of XM Satellite Radio and Sirius Satellite Radio raises a host of questions regarding implications of these developments for competition in the digital music marketplace.

Today's hearing provides the Task Force an opportunity to examine many of these issues, including an issue very important to me and the constituents I represent: whether the proposed merger will promote or impede diversity in the ownership and operation of the public broadcast airwaves.

I welcome our distinguished panel of witnesses:

- Mr. Mel Karmazin, CEO, Sirius Satellite Radio;
- Mr. David Rehr, President, National Association of Broadcasters;
- Ms. Gigi Sohn, President, Public Knowledge (non-profit public interest organization concerned with intellectual property law and communications policy);
- Dr. Mark Cooper, Director of Research, Consumer Federation;
- Charles Biggio, Esq., antitrust law expert, former Department of Justice official, and partner with the law firm of Wilson, Sonsini, Goodrich & Rosati.

Details of the XM-Sirius Merger

Mr. Chairman, since its inception in 1997, satellite radio has grown. It now serves a market of approximately 14 million subscribers. Sirius serves 6 million subscribers and offers more than 130 channels, with 69 commercial-free music channels and 65 channels of sports, news, talk, entertainment, traffic, weather, and other programming. XM serves 7.6 million subscribers and more than

170 channels, and broadcasts live from studios in several U.S. and Canadian cities.

Both companies have deals with important content providers. XM features Oprah Winfrey, while Sirius headlines Howard Stern and Martha Stewart. For sports, XM broadcasts all Major League Baseball (MLB) games, covers the Professional Golfers Associations (PGA) season, has exclusive contracts with Indy Racing League, and has contracts with several collegiate athletic conferences. Sirius's sports programming includes National Football League (NFL) games, National Basketball Association (NBA) games, NASCAR races, and other special events such as the Wimbledon.

Both companies also have arrangements with major automobile manufacturers to install their respective radio units in new cars. Typically, these arrangements offer new car owners three months of free subscriptions. Sirius currently has exclusive agreements with Ford, DaimlerChrysler, Mitsubishi, and BMW, while XM partners with General Motors and Honda. Depending on the dealership and the car model, either XM or Sirius can be found on new Toyotas.

On February 19, 2007, XM Satellite Radio and Sirius Satellite Radio announced their agreement to enter into a tax-free, all-stock

merger of equals with a combined enterprise value of approximately \$13 billion, which includes a net debt of approximately \$1.6 billion. Under the terms of the agreement, XM and Sirius shareholders will each own approximately 50 percent of the combined company, with XM shareholders receiving a fixed exchange ratio of 4.6 shares of Sirius common stock for each share of XM they currently own. Further, Mel Karmazin, currently Chief Executive Officer of Sirius, will become Chief Executive Officer of the combined company, and Gary Parsons, currently Chairman of XM, will become Chairman of the combined company.

As of December 31, 2005, XM had 710 employees, according to a filing with the Securities and Exchange Commission. The company currently owns a 150,000-square-foot headquarters in Washington, D.C. and leases space in New York and Nashville, Tenn., for broadcast studios. Sirius leases space in New York for its corporate office and broadcast facilities, and as of Dec. 31, 2005, Sirius had 614 employees, according to an SEC filing. Officials with XM and Sirius have said that they hope to determine the combined company's corporate name and headquarters location prior to the deal's closing,

and that the companies will continue to operate independently until their transaction is completed.

Antitrust Legal Principles and Public Interest Standards

The three principal antitrust statutes are sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. Section 1 of the Sherman Act prohibits concerted activity that produces restraints on trade, while section 2 prohibits anyone from monopolizing a market through restrictive or exclusionary conduct.

Section 7 of the Clayton Act complements the Sherman Act by outlawing mergers where “the effect . . . may be substantially to lessen competition, or to tend to create a monopoly.” Effective merger enforcement is intended to arrest competitive problems in their incipency, rather than waiting for the merger’s anticompetitive effects to cause actual harm in the marketplace.

The parties to a merger involving assets valued above a specified threshold -- the current threshold is generally \$ 59.8 million -- must also comply with section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino Act. Under this provision, the parties must notify the federal antitrust enforcement agencies, the Department of Justice’s Antitrust Division and the Federal Trade

Commission, and wait a specified period of time before closing in order to enable the appropriate agency to assess the merger's potential effects on competition. The two agencies determine which will review a particular merger based on which has the greatest and most recent relevant experience.

In evaluating a merger, the FTC and the Department of Justice both focus on the effect of the merger on competitive rivalry in the marketplace. The agencies' analytical approach to evaluating mergers is described in the Merger Guidelines. The unifying theme of the Guidelines is that *mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power means, for a seller, the ability to profitably maintain prices above competitive levels for a significant period of time.*

A first step in analyzing a merger is to define the relevant product and geographic markets within which the merger's competitive effects are to be assessed. Generally, the market is determined based on an analysis of what consumers would actually regard as practical alternatives to buying from the merging parties. Defining the market is a case-by-case assessment, depending on a careful analysis of the particular facts.

Once the market is defined, the assessment turns to an evaluation of how the merger is likely to affect competition in that market. In some cases, more than one potentially affected market is defined, and they are each analyzed separately. The anticompetitive effects of market power can manifest themselves through price increases, or as reductions in output, narrowing of consumer choices, or dampening of innovation. This is also a case-specific, fact-intensive exercise.

To define the market, the agency asks “whether all the firms in the market as tentatively defined could profitably raise prices by 5% for one year without losing too much business to other firms.” If the answer is yes, then that market definition is appropriate. But if the answer is no, “the market definition must be expanded because the other firms that customers would begin patronizing are true rivals and must be considered in determining market share.”

In industries undergoing rapid technological change, the market definition may need to be further broadened to take into account products that are demonstrably on the verge of becoming practical substitutes for the products at issue. While this can make the analysis more complex, it does not change the fundamental objective

of identifying which products are appropriately taken into account in assessing potential harm to competition. Significantly, the antitrust agencies' policy is to require that the coming availability of the other products as practical substitutes be imminent and demonstrable; they will not consider alternatives that are too remote, contingent, or speculative.

In the case of the proposed XM-Sirius merger, those firms are the only two offering satellite radio in the United States. The antitrust analysis may turn on whether the market is viewed narrowly to include only those two firms – in which case the merger would result in a monopoly – or is viewed more broadly to include possible entry by WorldSpace from the Eastern Hemisphere, or more broadly still to encompass other means of obtaining digital music, such as internet broadcasting, cellphone, or by iPods.

XM, Sirius, and proponents of the merger argue that the market should be defined broadly because the satellite companies face immense competition from several music outlets. The companies have stated: "In addition to existing competition from free 'over-the-air' AM and FM radio as well as iPods and mobile phone streaming,

satellite radio will face new challenges from the rapid growth of HD radio, Internet radio and next generation wireless technologies.”

Opponents of the merger argue that satellite radio is a separate market because satellite radio reaches audiences nationwide while terrestrial radio is local, with limits on how far it can reach. While the two may compete in local markets, local stations cannot compete in the national market. Moreover, satellite radio is the only multi-channel mobile audio programming service available.

Opponents also claim that wireless is not a true competitor because, while consumers can envision a future where they listen to their music on their cellphone, the reality is that most wireless carriers impose strict limits on what you can listen to or watch on a phone. Listening to a Web radio station on a phone’s Internet connection violates most of their contracts.

Moreover, opponents point out that consumer preference plays an important role in determining if other music devices are practical alternatives. As Steven Pearlstein of the *Washington Post* wrote: “Any of us could switch if the other channels offered lower prices or superior quality, but the differences would have to be pretty significant to overcome habit and personal preference.”

Finally, opponents point to the DOJ's suit challenging the EchoStar-DirecTV merger in 2002, which opponents argue is identical to the current proposed XM-Sirius merger. In that case, the DOJ concluded that the market should be defined narrowly and include only multichannel video programming distribution services. In the EchoStar-DirecTV case, the DOJ based its conclusion on the ground that standard over-the-air broadcast television does not include as many channels, popular services such as ESPN, CNN, and others, and access to premium channels such as HBO. The DOJ concluded: "Thus, most consumers do not consider broadcast television an acceptable substitute for cable and DBS services."

FCC's Public Interest Standard and Analysis

In addition to its authority to challenge mergers under the federal antitrust laws the federal government, acting through the FCC, has authority over transfers of broadcast licenses, including transfers incidental to mergers and acquisitions. While the question under antitrust analysis is whether the merger will substantially lessen competition in any line of commerce, the FCC applies a broader "public interest" standard.

In past merger analysis, specifically during the DirecTV-EchoStar merger, the FCC has applied its standard by weighing the potential public interest harms against the potential public interest benefits. As the FCC stated in that proceeding:

Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,” which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services. The Supreme Court has repeatedly emphasized the Commission’s duty and authority under the Communications Act to promote diversity and competition among media voices: It has long been a basic tenet of national communications policy that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” *Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.* In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.

A. Potential Benefits from the Merger

According to Sirius and XM, the merger would result in efficiencies and synergies that will allow the combined company to better manage and save operating costs, including (1) general and administrative costs, (2) sales and marketing costs, (3) subscriber

acquisition costs, (4) research and development costs, (5) product development, manufacturing, and inventory costs, and (5) programming operating infrastructure.

Wall Street analysts' estimates of the present value of cost synergies range from around \$3 billion to \$7 billion. While the full realization of cost synergies is uncertain and may take years, the two companies repeatedly assert the necessity of a merger for their survival. Gary Parsons, Chairman of XM, said, "the combined company will be better positioned to compete effectively with the continually expanding array of entertainment alternatives..."

XM and Sirius also argue that the combined company will provide consumers with a broader selection of content, as well as the ability to pick and choose the channels the consumers want on more of an a la carte basis. Some channels would be eliminated to reduce overlap, but the companies would "improve on products, such as real-time traffic and rear-seat video, and introduce new ones, such as advanced data services, including enhanced traffic, weather and infotainment offerings."

According to company representatives and some financial analysts, a merger would greatly help the two struggling companies.

Both XM and Sirius have been losing money, with combined losses of \$1.5 billion in 2005. One reason the companies are struggling financially is because they have been engaged in a bidding war to sign certain content and talent in order to attract listeners. For example, XM signed a \$650 million deal with Major League Baseball in 2004 for the right to broadcast every single MLB game for 11 years. XM has also signed a 3 year contract worth \$55 million with Oprah Winfrey. And Sirius is currently spending approximately \$100 million per year for the Howard Stern Show.

Finally, the companies assert that a merger would allow them to offer more diversity and variety to the consumers, including more public interest programming. Although they are not currently mandated to provide a minimum amount of public interest programming, such a mandate or promise from the companies, would be of great service to the public, assuming that the subscription fee remains affordable to potential listeners.

B. Potential Harms from the Merger

While the companies promise enhanced programming and broadened content, opponents have asserted that the current competition between XM and Sirius has caused the two companies to

acquire the best programming for the consumers. If the companies merge, opponents argue, they would have less incentive to seek attractive radio personalities, or continue signing those costly but popular sports deals.

Opponents also point to the technological and contractual issues that will result from the merger. In other words, it is uncertain whether and when the consumer would actually get the benefits of the combined programming because both companies will have to develop technology that enables the subscriber to listen to the content currently provided by the other company.

For example, a consumer with an XM radio may not get the contents offered on Sirius even after the merger unless the companies are able to make appropriate technological adjustments. Another scenario involves consumers being forced to abandon their current satellite radio receivers and purchase new ones in order to reap the benefits of the merger. The companies would also likely have to rework their contracts with their content providers.

Opponents also raise concerns over the unchecked ability for the combined company to raise subscription fees. While the companies argue that they are competing against other electronic

media, such as Apple's iPod and over-the-air radio, each offers different pricing structures. For example, unlike XM and Sirius, Apple does not charge a subscription fee and instead profits on the sale of the devices and song purchases; traditional and digital radio also do not charge their listeners subscription fees and instead profit mainly on advertisement. With these different business models, it is uncertain that the combined satellite company would not raise subscription prices.

Further, in response to the companies' broad description of the relevant market, critics of the merger argue that defining the market so broadly would set a precedent with undesirable results, namely the merging of terrestrial radio stations or portable music device makers. In other words, already-dominant companies like Clear Channel and Apple can rely on the same premise – that they face competitions from other forms of media – to swallow major competitors.

Lastly, opponents challenge the wisdom of allowing a monopoly to "bail out" two struggling companies. Some critics are especially unsympathetic because they believe XM and Sirius have engaged in poor business practices by overpaying for contents, overspending, and over-promising their investors.

For all of these reasons, Mr. Chairman, I thank you for convening this hearing and I look forward to an engaging and substantive dialogue between the witnesses and members of the task force.

Thank you, Mr. Chairman. I yield the remainder of my time.

Mr. CONYERS.T1 MR. DAVID REHR, PRESIDENT OF NAB, YOU ARE ON FOR 5 MINUTES.

**TESTIMONY OF DAVID REHR, PRESIDENT AND CEO,
NATIONAL ASSOCIATION OF BROADCASTERS**

Mr. REHR. Thank you, Mr. Chairman. Good afternoon, everyone, and thank you for the opportunity for me to be here today.

I want to commend you, Mr. Chairman, Ranking Member Chabot and Ranking Member Smith on the Judiciary Committee and the Members of the Antitrust Task Force for exploring the issues surrounding what is in effect a Government-sanctioned monopoly.

In my time today, I would like to make five points.

Number one, the national satellite radio market is currently a two-company duopoly trying to become a Government-sanctioned monopoly.

Number two, such a monopoly would violate FCC rules and precedent, congressional policy and antitrust principles.

Number three, this Government-sanctioned monopoly would undermine audio content competition, not enhance it.

Number four, even worse, two entities that have a pattern and practice of violating the terms of their FCC licenses cannot be trusted with monopoly power.

Five, finally, by their own admission, both XM and Sirius are not failing companies and should not receive a Government bailout.

First, the national satellite radio market is currently a two-company duopoly trying to become a Government-sanctioned monopoly. There are two companies in the market for nationwide multi-channel mobile audio programming services. They are asking to become one company.

They want the power to set subscription rates without constraint from a competing service. They want the power to eliminate the need to compete with each other to acquire programming and talent. They want the power to demand exclusive deals and the ability to cross-subsidize to unfairly compete against local radio broadcasters. And the fact is, this monopoly would reduce innovation for services and equipment for consumers since there will be no competition in the defined market.

Two, such a monopoly would violate FCC rules and precedent, congressional policy and antitrust principles. The FCC specifically refused to sanction a monopoly when it establish a national radio service in 1997, saying licensing at least two providers will help assure that subscription rates are competitive as well as provide for diversity of programming voices.

Ironically, the argument for greater competition came from Sirius, then called CD Radio. They argued that multiple providers were necessary to "assure intra-service competition." They said more players would have "compelling market-based incentives to differentiate themselves from competitors."

Perhaps most telling, Sirius explicitly stated that no satellite provider should never be permitted to combine with another provider because "such a development would have serious anticompetitive repercussions."

In fact, in 1997, at the urgings of the parties, the FCC explicitly prohibited any such future merger, stating one licensee would not

be permitted to acquire control of the other. The only parallel circumstance to this instance is when the FCC refused in 2002 to permit a merger of the only two nationwide satellite television companies, EchoStar and DirecTV. The commission rejected this merger by a unanimous vote.

The commission found that the antitrust laws are hostile to proposed mergers that would have these impacts on competitive structures because such mergers are likely to increase the incentive and ability to engage in anticompetitive conduct.

Moving from a duopoly to a monopoly, as is the case here, would also be inconsistent with congressional policy favoring competition over monopoly as expressed in the 1996 Telecommunications Act and with long-standing enforcement of Federal antitrust laws.

Three, this Government-sanctioned monopoly would undermine audio content competition, not enhance it. A satellite radio monopolist could undermine competition by using its national market power to force content providers, like sports programmers, to deal only with them. It could also use cross-subsidies to engage in anti-competitive behavior against local radio broadcasters.

Four, two entities that have a pattern and practice of violating their FCC licenses cannot be trusted with monopoly power. Both companies certified 10 years ago that they would comply with an FCC rule to develop a device that works with both services. Still today, 10 years later, no consumer device is available.

Both companies routinely violated FCC Part 15 rules, which govern the production and distribution of receiver equipment. Both companies routinely and regularly violate FCC technical rules. XM operated more than 142 repeaters at unauthorized locations.

Mr. CONYERS. Mr. Rehr, you are the first witness to go over time.

Mr. REHR. I am sorry.

Let me conclude by saying, point five: Some have suggested the merger is necessary for the survival of these companies, but by their own admission, this is not true.

Thank you, Mr. Chairman. And thank you.

[The prepared statement of Mr. Rehr follows:]

Statement of

David K. Rehr

President and CEO

National Association of Broadcasters



**Hearing on
Competition and the Future of Digital Music**

**United States House of Representatives
Committee on the Judiciary
Antitrust Task Force**

February 28, 2007

INTRODUCTION

Mr. Chairman, Task Force members, thank you very much for having me here today. My name is David K. Rehr, and I serve as the President and Chief Executive Officer of the National Association of Broadcasters.¹

At the NAB, we are proud to represent more than 8,300 diverse radio and television stations across the United States, as well as broadcast networks. Our members are the backbone of our nation's communities, serving their listening and viewing audiences through public service initiatives, local news and public affairs programming, and vital community information – such as emergency warnings, severe weather alerts, and AMBER alerts.

The National Association of Broadcasters advocates on behalf of all these stations – large and small, urban and rural – before Congress, the Federal Communications Commission and the general public. These stations employ nearly 250,000 hard working Americans, and reach nearly every household. Local radio and television broadcasters provide a free, over-the-air service, keeping their communities – and your constituents – informed and connected.

¹ David K. Rehr holds an M.A. and Ph.D. in economics from George Mason University, as well as a B.S. in Business Administration from Saint John's University. He has nearly 25 years experience in regulatory and anti-trust issues. Previous experience includes serving as a professional staff member of the House Small Business Subcommittee on Antitrust and Restraint of Trade, director of federal government relations for the National Federation of Independent Business, and President of the National Beer Wholesalers Association.

The issue we are here to talk about today is of tremendous importance. It affects not only the future of satellite radio in America, but portends great potential harm to the American public and to the many benefits of free local radio broadcasting.

XM AND SIRIUS ARE ASKING FOR A GOVERNMENT SANCTIONED MONOPOLY

As I explain below, the proposed merger of XM Radio Inc. and Sirius Satellite Radio Inc. must be rejected. Public policy should never allow one entity to acquire state-sanctioned, monopoly control over the 25 MHz of spectrum allocated to satellite radio service. Such a merged entity would control several hundred channels of radio programming in every local market in this country without any realistic check on its ability to assert market power.

One can easily see what XM and Sirius are really asking for here. They want the ability to set subscription prices for national satellite radio service without constraint from a competing service. They want to eliminate the need to compete with another national service provider to acquire programming and talent that wish to reach the national audio market. They want the ability to demand exclusive access to attractive programming, such as sporting events. And, they want to reduce the need to spend money on innovative service and equipment for consumers.

The downsides of a government sanctioned monopoly are clear. Monopolists have the ability to raise prices and discriminate. As we saw in the telephone world for many years, monopoly providers do not respond quickly to consumer needs and wants.

As a result, innovation suffers. While the monopolist may engage in some innovation, the incentive is to protect current investment and slow introduction of new products and services for the public, especially any new products that might compete with the existing products and services being offered by the monopolist. As my testimony demonstrates in detail, there is no possible reason to grant this proposed merger to monopoly in the market for national, multichannel mobile audio programming services.

THE PROPOSED MERGER VIOLATES FCC RULES AND PRECEDENT AND CONGRESSIONAL POLICY

The FCC specifically refused to sanction a monopoly when it allocated spectrum for the satellite digital audio radio service (DARS) in 1997. It chose not to permit a monopoly satellite radio service because “licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices.”² And, I note, the agency was assuming at that time that each provider would control around 50 channels, not the 282 channels that a united XM/Sirius would have today.

Ironically, the FCC in part based its decision to require multiple satellite radio providers on arguments presented by Sirius. During the FCC’s consideration of how many different satellite radio providers it should authorize, Sirius (then called CD Radio) argued strenuously that multiple providers were necessary to “assure intra-service competition,” and that the FCC should divide the relevant spectrum evenly among all

² See *Establishing Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd 5754, 5786 (1997) (Satellite DARS Report & Order).

licensed satellite radio providers.³ Sirius also maintained that creating multiple satellite radio systems would guarantee a diversity of programming offerings because each satellite radio provider would have “compelling market-based incentives” to differentiate itself from the other providers. CD Radio Comments, at 17.

For these reasons, Sirius explicitly stated that no satellite radio provider should ever be permitted to combine with another provider. Sirius believed that “such a development would have serious anticompetitive repercussions,” including reducing the diversity of programming sources and a lessening of price competition. *Id.* at 18.

Even more ironically, Sirius was making these arguments in the context of the FCC licensing scheme proposed at the time, which contemplated four different satellite radio providers. Sirius was thus strenuously opposed to any FCC policy that might allow the shrinking of the satellite radio market from four different competitive providers to three or two. Now, only a few years later, Sirius apparently sees no problem with allowing the satellite radio market to shrink from two competing duopoly companies down to only one, who will have monopoly control over the entire national market.

The point is that it would be entirely inconsistent with the pro-competitive satellite radio licensing scheme created by the Commission to now allow XM and Sirius to combine into a monopoly enterprise. At the urging of the parties, including Sirius, the Commission in 1997 explicitly prohibited any such future merger by determining that, “after DARS licenses are granted, one licensee will not be permitted to acquire control of

³ CD Radio Comments in IB Docket No. 95-91, at 17.

the other remaining satellite DARS license.” *Satellite DARS Report & Order*, 12 FCC Red at 5823. There is no basis for reversing that decision now.

In a parallel circumstance, the Commission refused in 2002 to permit a merger of the only two nationwide Direct Broadcast Satellite (DBS) licensees, EchoStar and DirecTV. In rejecting this proposed merger, the Commission found in a unanimous vote that the combination would undermine its goals of increased and fair competition in the provision of satellite television service. The agency also found that the claimed benefits of efficient spectrum use were outweighed by substantial potential public interest harms that might result from the transaction, including reduced innovation, impaired service quality and higher subscription prices. The Commission further stressed that the merger would eliminate a current viable competitor from every market in the country and would result in one entity holding the entire available spectrum allocated to the DBS service.⁴ For precisely the same reasons, XM and Sirius should not be permitted to create a nationwide satellite radio monopoly.

Like the rejected EchoStar/DirecTV merger, the proposed satellite radio merger would eliminate a viable competitor providing service across the country and would result in a single company controlling all the spectrum allocated to a nationwide satellite service. As the FCC noted when declining to approve the EchoStar/DirecTV merger, the antitrust laws are “hostile to proposed mergers that would have these impacts on the competitive structure, because such mergers are likely to increase the incentive and

⁴ See *EchoStar Communications Corp.*, 17 FCC Red 20559, 20562, 20661-62 (2002) (*EchoStar/DirecTV Merger Order*).

ability to engage in anticompetitive conduct.” *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20662. Allowing XM and Sirius to hold the entire available spectrum allocated to satellite DARS would similarly increase the incentive and ability of these parties to engage in anticompetitive conduct, to the ultimate detriment of consumers. *Id.* at 20626 (noting reductions in future innovation, declines in service quality and pricing problems as likely to result from satellite television merger).

To allow the proposed merger creating a satellite DARS monopoly would thus be inconsistent with the FCC’s order establishing this service, with Commission precedent in the satellite television context, and with its long-standing policy of establishing spectrum-based commercial services with no fewer than two participants per service. Congress should encourage the FCC to retain its faith in competitive markets and refuse to sanction a satellite radio monopoly.

Such a government-sanctioned monopoly would clearly also be inconsistent with congressional policy favoring competition over monopoly, as expressed in the 1996 Telecommunications Act, and with long-standing enforcement of the antitrust laws. Indeed, the courts have held that even mergers to *duopoly* are, on their face, anticompetitive and contrary to the federal antitrust laws.⁵ Without question, a merger to *monopoly* would be anticompetitive, inconsistent with antitrust precepts and contrary to judicial decisions.

⁵ See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

THERE ARE DISTINCT LOCAL AND NATIONAL MARKETS

XM and Sirius will no doubt argue that they are not proposing a monopoly because, they say, satellite radio competes against AM and FM radio broadcasting, the Internet, and other emerging technologies. And they will ask: how can NAB contend that a single satellite radio provider will be a monopoly while at the same time claiming in the FCC's broadcast ownership proceeding that satellite radio competes with local radio stations? The answer is simple – there are two different markets at issue, a national market and a local market.

NAB's comments in the FCC's ownership proceeding explain that broadcasters face competition today in their local markets from a number of sources including XM and Sirius. Plainly satellite radio affects local markets because consumers in all local markets across the country can receive and choose to subscribe to the satellite radio services. The fact that millions of subscribers in various local markets across the country have chosen to subscribe and listen to satellite radio services, rather than just listening to local stations, clearly affects the numbers of listeners that terrestrial broadcast stations attract (and thus ultimately the advertising revenues earned by these stations).

On the other hand, local stations do not compete in the national market for multichannel mobile audio services. As the FCC has recognized, satellite radio, with its national reach, offers "services that local radio inherently cannot provide." *Satellite DARS Report & Order*, 12 FCC Rcd at 5760-61. For example, satellite radio can provide continuous service to the long-distance motoring public and to persons living in

remote areas. *Id.* Unlike even the most powerful terrestrial radio stations, which can still only reach a mere fraction of American consumers, satellite radio service can reach all listeners across the country with vastly more channels than any single terrestrial broadcaster. Other media industry observers have agreed that “[s]atellite radio is a national platform,” thereby clearly differing from locally-licensed and locally-oriented terrestrial broadcast stations.⁶ Simply put, only XM and Sirius compete in this national, multichannel mobile radio market, and they are proposing to form a state-sanctioned monopoly in that market.

XM AND SIRIUS WILL BE ABLE TO EXERCISE UNLIMITED MARKET POWER IN THE NATIONAL RADIO MARKET

My training as an economist tells me that XM and Sirius are acting like classic market players. Adam Smith noted in *The Wealth of Nations* over 230 years ago that all companies work toward monopoly. From a company perspective, monopoly is desirable: it allows the company to achieve market power and gives them the ability to set prices unilaterally and act as a gatekeeper without any reasonable competitive check.

More specifically here, having monopoly status would enable the united XM and Sirius to stop agreeing to pay outrageous talent salaries and to exert greater pressure on programming suppliers. Eliminating competition in the national mobile radio market through this proposed merger would also greatly reduce incentives for the combined XM and Sirius to innovate. A monopolistic market structure is inevitably less innovative than

⁶ Katy Bachman, *Buyers: Size Not Enough for Sirius/XM Merger*, Media Week (Feb. 26, 2007) (quoting Matt Feinberg, Senior Vice President of Zenith Media).

a competitive one, and the consumers of satellite radio services will accordingly fail to benefit from innovations such as improved programming services and technical improvements. In fact, when declining to approve the EchoStar/DirecTV merger, the FCC specifically found that the satellite television merger “would likely reduce innovation and service quality.” *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20626.

Perhaps most obviously, enjoying monopoly status would permit a merged XM/Sirius to raise subscription prices without any competitive check on its actions. The complete elimination of competition in the marketplace for nationwide, multichannel mobile radio services would remove competitive pressure on rates and almost inevitably result in rate increases for consumers. For example, the FCC recently determined that cable television rates have increased by 93% since enactment of the 1996 Telecommunications Act.⁷ The agency has attributed this tremendous increase to the lack of competition from a second cable operator in most communities. Interestingly, the FCC also concluded that competition from DBS has had minimal effect on cable prices, finding that only the presence of a similarly-situated, directly competing cable operator worked to constrain cable prices.

The analogy to the XM/Sirius merger is unmistakable. Without the presence of a direct competitor, a satellite radio monopolist could raise rates freely. Indeed, the courts have enjoined mergers to monopoly on the grounds that such mergers would allow the

⁷ See *Report on Cable Industry Prices*, MM Docket No. 92-266 (rel. Dec. 27, 2006).

combined company “to increase prices or otherwise maintain prices at an anticompetitive level.”⁸ To again look to the wisdom of Adam Smith, the “price of monopoly is upon every occasion the highest which can be got.”

Beyond resulting in rate increases for consumers, the XM/Sirius monopoly would also likely reduce program diversity. As explained by the Commission when authorizing XM and Sirius, competing satellite radio providers would each have incentives to diversify their own program formats, thus providing valuable niche programming. *See Satellite DARS Report & Order*, 12 FCC Rcd at 5762. Without such competition, program diversity would likely be adversely affected, with consumers losing music and talk formats, especially niche ones. Of course, there is also the very real risk that a combined XM/Sirius will use its market power to force content providers like sports programmers to deal only with them. If the merger is approved, it may only be a matter of time before the American public can listen to their favorite baseball or college football team by paying whatever monopoly rents a combined XM/Sirius chooses to charge. We’ve seen it happen with cable, and given the obvious incentives, there is every reason to expect the same thing to happen here. In sum, in a monopoly environment, satellite radio subscribers would pay higher prices for less diverse and less innovative programming.

⁸ *FTC v. Staples*, 970 F. Supp. 1066, 1081-82 (D.D.C. 1997).

XM/SIRIUS HAVE A LONG TRACK RECORD OF BREAKING THE RULES

The government cannot and should not rely on any promises that a united XM and Sirius, as a government sanctioned monopoly, will not cause harm to consumers. Their past behavior in a number of instances shows otherwise.

First, both companies have violated an FCC rule on receiver interoperability. Despite a clear FCC directive that their satellite radio systems must include “a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction,”⁹ neither XM nor Sirius markets such a consumer-friendly device. And, while both companies certified nearly 10 years ago that they would comply with this pro-competition, pro-consumer requirement, they have not done so. Instead, the companies contend that they are technically complying by “jointly developing” a common receiver platform while making no apparent effort to make the device a reality. In carefully worded SEC filings, the companies report that technology for a unified receiver standard “is being developed” but “we have no assurances that any manufacturer will build . . . such dual-mode radios.”¹⁰ Thus, the companies have undermined the efficacy of this FCC rule designed to “promote competition by reducing transaction costs and enhancing consumers’ ability to switch between competing DARS providers.” *Satellite DARS Report & Order*, 12 FCC Rcd at 5796.

⁹ 47 C.F.R. § 25.144(a)(3)(ii).

¹⁰ See Sirius Satellite Radio Inc. SEC Form 10-K at 9 (March 13, 2006); XM Satellite Radio Holdings Inc. SEC Form 10-K at 11 (March 3, 2006).

Second, with similar disregard for consumer interests, both XM and Sirius have violated FCC Part 15 rules, which govern the production and distribution of their receiver equipment.¹¹ These rules are designed to ensure, among other things, that equipment such as satellite radio receivers do not interfere with broadcast radio stations or other licensed spectrum users. As a result of XM and Sirius producing and distributing receiver equipment that violates – and in a number of cases very greatly exceeds – FCC limits on the power levels for such equipment, many listeners to terrestrial radio stations experience “bleedthrough” and receive the XM or Sirius signal without warning through their radios. As has been widely reported, the FCC has received many complaints from both commercial and non-commercial listeners who suddenly hear uncensored and unwelcome satellite radio programming on their car radios.¹² That's why NAB has been calling on XM and Sirius for months to do the right thing, and recall the hundreds of thousands of satellite radio receivers in the market that continue to interfere with free over-the-air radio broadcasts.

Third, both XM and Sirius routinely and regularly violate FCC technical rules. In particular, these companies have admittedly violated FCC rules in connection with their special temporary authority to use terrestrial repeaters. For years XM operated more than 142 repeaters (or 18 percent of all its repeaters) at unauthorized locations and at least 19 of its repeaters without any FCC authorization at all. Even after confessing and seeking the FCC's forgiveness for its violations, XM to our knowledge currently continues to

¹¹ 47 C.F.R. Part 15.

¹² See, e.g., “A Mystery Heard on Radio: It's Stern's Show, No Charge,” New York Times, January 26, 2007 at A17.

operate at least four of its repeaters without any authorization from the FCC. Also troubling is XM's confession that for years it has operated more than 221 terrestrial repeaters (or 28 percent of all its repeaters) at unlawful power levels.

For its part, Sirius has engaged in comparable and other technical violations in connection with its terrestrial repeaters. For example, Sirius constructed at least 11 of its repeaters at locations different from what they reported to the FCC, including one in Michigan that is 67 miles away from its reported and authorized location.

Within the past few weeks, the FCC issued a letter to XM about its unlawful repeater network. The agency is presumably seeking information about the actual locations and power levels of XM's repeaters; the circumstances surrounding why XM apparently failed to follow the FCC's rules when installing the network; and why it took XM almost five years to reveal all the problems.

These violations arguably demonstrate a pattern of misconduct and lack of candor that raise serious questions regarding whether the companies can be relied on in the future to comply with FCC rules or with any conditions imposed or offered as part of the merger. This is particularly the case to the extent that the violations may have been intentional. In this regard, Sirius has admitted that its unlawful receivers were the result of specific requests by its employees to manufacturers.¹³

¹³ Sirius Satellite Radio Inc. SEC Form 10-Q at 35 (Nov. 8, 2006) ("certain SIRIUS personnel requested manufacturers to produce SIRIUS radios that were not consistent with these rules.").

Against this backdrop of rule violations, allowing XM and Sirius to create a monopoly in violation of the FCC's anti-merger decision and decades of communications policy could simply embolden them to pay even less attention to the rules of the road in pursuit of monopolistic profits.

THESE ARE NOT FAILING COMPANIES IN SPITE OF MAKING BAD BUSINESS DECISIONS

There is no need to risk all these harms by creating this monopoly. Satellite radio is still in its early stages of development. And, despite protestations in the press, neither XM nor Sirius is a failing company. From an economic perspective, the classic "shut down" analysis illustrates that a firm will exit an industry when its average variable cost exceeds price, which implies that the last unit sold makes a negative contribution to the firm's margins. When applied to XM and Sirius, there is no basis to conclude that either company is ready to exit the industry. Indeed, a review of reports by equity analysts demonstrates that Sirius and XM are currently earning positive margins on their last subscribers. Moreover, as satellite radio penetration rates increase, average variable costs will decrease and thereby generate even larger margins. Thus, there is no basis in economic fact for a failing-firm argument.

You need not take my word about the status of XM and Sirius. XM apparently believes that neither itself nor Sirius will go out of business if the merger does not occur. In a filing with the Securities and Exchange Commission last week, XM disclosed a set of questions-and-answers regarding the merger prepared for and distributed to its

employees. I quote: “Can Sirius and XM succeed as stand-alone companies if the merger is not approved by regulators? – **YES**. That said, we believe a merger is the **preferred** option for Sirius and XM, our shareholders and customers” Of course Sirius and XM would prefer not to compete with one another, and would prefer to reap the benefits afforded by monopoly status. What company wouldn’t? That’s why the United States has and enforces antitrust laws.

Any suggestion that XM and Sirius are weak or failing businesses based on the amount of debt and the levels of expense must be viewed with a healthy dose of skepticism. It is true that XM and Sirius have had some extraordinary expenses - like the nearly \$83 million in stock that Sirius awarded to Howard Stern last month, on his first anniversary on satellite radio. Indeed, the extraordinary costs of locking-up national and regional programming, especially sports programming, on an exclusive basis accounts for a great deal of the cost overhead. But, should companies be able to expect a government bailout for questionable business decisions?

ANY CHANGES IN THE MARKET ENVIRONMENT DO NOT JUSTIFY THE RISK OF MONOPOLY

As for these parties’ assertion that the audio marketplace has radically changed and, therefore, the merger is justified, it goes without saying that the audio marketplace is constantly changing. Mere introduction of new audio products, however, can never justify the creation of a government licensed and sanctioned monopoly for satellite radio service. Plain and simply, monopolies are inherently bad. So government should take heed. The history of calculated, intentional rule violations by these two companies

speaks volumes about what kind of conduct you should expect from a satellite radio monopoly, even if the merger were granted with the most extensive set of safeguards and conditions.

Beyond harming consumers, a satellite radio monopoly would have the incentive and the opportunity to engage in unfair competition and anticompetitive practices against other audio service providers, especially radio broadcasters. For example, after a satellite monopoly restructures (unbundles) its program offerings, as promised, we can expect, based on press reports, that the monopoly will attempt to accelerate the acquisition of new subscribers by offering them a lower-cost point of entry -- likely a basic advertiser-supported tier offered for less than the current \$12.99 per month. On its face, such a plan may not sound bad, but of course no introductory price would be locked in and a monopoly provider could easily raise this price at a later time to increase profits at the expense of consumers.

Furthermore, the merger parties' announced intention to go after advertising revenue is plainly problematic when one considers the monopoly status of the merged satellite radio operator. With monopoly rents from subscription service, the satellite radio monopoly would have the incentive and ability to cross subsidize its advertiser-supported channel offerings using the monopoly rents from subscription service. Unfair competition in the form of predatory pricing in national advertising markets would be a likely consequence. In addition, the satellite radio monopoly would not stop at national advertising. The combined terrestrial repeater networks of Sirius and XM under common

control would offer substantial opportunities for entry into the local advertising markets by a satellite radio monopoly. The rates for local advertising could be set artificially low with cross-subsidization from monopoly prices. The valuable free, over-the-air service provided by local radio stations – which is entirely advertiser-supported – would be jeopardized by these developments.

THIS MERGER OFFERS NO PUBLIC INTEREST BENEFITS AND SHOULD BE SUMMARILY REJECTED

Worst of all, this merger will not provide sufficient consequential public interest benefits to justify a total monopoly in satellite radio. There are no genuine long-term consumer benefits to this merger, unless you trust a satellite radio monopoly miraculously to put consumers before its profits. Without satellite radio competition, satellite radio subscribers will pay more for what they now receive in a bundle. Without such competition, satellite radio program diversity will be greatly diminished. Without such competition, satellite radio will lose its value as a commercial-free medium to its subscribers. Without such competition, satellite radio subscribers will be left with stranded costs in soon-to-be obsolete receivers. Simply put, all of the consumer welfare benefits described by the merger proponents are short-lived and illusory, compared to the potential permanent harms such a monopoly will pose.

Without question, XM and Sirius will be unable to meet the requisite burden of proof demonstrating the level of public interest benefits necessary to even consider granting a government sanctioned monopoly. As the FCC explained in declining to approve the comparable EchoStar/DirecTV merger: Where “a merger is likely to result

in a significant reduction in the number of competitors and a substantial increase in concentration, antitrust authorities generally require the parties to demonstrate that there exist countervailing, *extraordinarily large*, cognizable, and non-speculative efficiencies that are likely to result from the merger.” *EchoStar/DirecTV Merger Order*, 17 FCC Red at 20604 (emphasis added). The courts have similarly stressed that proof of extraordinary efficiencies is required to rebut the presumption that a merger in a concentrated market (such as the current duopoly market for nationwide, multichannel mobile radio service) will be anticompetitive. *See, e.g., FTC v. Heinz*, 246 F.3d at 720-21.

Clearly, XM and Sirius will fail to meet this heavy burden. Not only are the parties unable to show “extraordinarily large,” non-speculative efficiencies resulting from this merger, the proposed merger will in fact seriously impair marketplace competition and cause cognizable harms to consumers, as I have discussed in detail in this testimony. Thus, there is no reason to approve a merger that would violate FCC rules and precedent, as well as congressional policy, and would grant a state sanctioned monopoly to non-failing companies with a long track record of breaking the rules.

NAB fully supports competition on a level playing field. When all the factors are considered, the proposed merger of Sirius and XM is simply anti-competitive. It is a monopoly in violation of the antitrust laws. It should be dead-on-arrival at the Department of Justice and the FCC. Congress should clearly and expeditiously express its opposition to this merger to both the Administration and the FCC.

Mr. CONYERS. Thank you very much.
We welcome now Ms. Sohn.

**TESTIMONY OF GIGI SOHN, PRESIDENT AND FOUNDER,
PUBLIC KNOWLEDGE**

Ms. SOHN. Thank you, Chairman Conyers, Ranking Member Chabot, Ranking Member Smith and other Members of the Task Force for inviting me to discuss the merger of XM and Sirius Satellite Radio.

The proposed merger presents a dilemma for public interest advocates. On one hand, the only two providers of satellite radio service, which have vigorously competed for the past 5 years, are seeking to consolidate, raising questions about the impact on prices and choice for consumers. On the other hand, this vigorous competition has led to a spending war for new and better programming, leaving both competitors weakened in a world where Internet radio, broadcast and HD radio, cable radio and other multi-channel music, entertainment and information services have become increasingly popular.

Regardless of the financial woes of the companies and any change in the market structure, the salient question is this: will consumers be better off.

I believe that if the merger passes antitrust scrutiny, consumers will be better off if the merger is approved subject to conditions that protect consumer choice, promote diverse programming and keep prices in check.

The antitrust questions raised here are very complex and ultimately depend on information to which public knowledge does not have access. For instance, the foremost question is how narrowly or broadly defined the relevant market? While I believe the market should be defined more widely to include a wide variety of radio, wireless, mobile and multi-channel music services, it is unclear whether consumers would turn to those services if satellite radio prices were raised.

Anecdotal evidence suggests that there is nothing shortage of substitutes. On the other hand, we cannot ignore the fact that there are real differences between satellite radio and its competitors. Consumer data and other evidence would be helpful in determining whether these competitors are indeed substitutes and would constrain prices.

Should the merger survive antitrust scrutiny however, I believe that the public interest would be served by permitting the merger subject to conditions that promote diversity, preserve consumer choice, and keep prices in check. I have reached this conclusion for several reasons.

First, consistent losses and flattening subscribership at both companies make it less likely that they will take a chance in alternative programming and programming that meets the needs of underserved communities. A combined subscriber base would allow the new company to distribute the high fixed cost of a satellite system across a larger consumer base, reducing the cost for the subscriber and enabling new programming and/or lower prices.

Second, consumers would gain access to channels that they could not receive unless they subscribed to both services.

Third, eliminating duplicative channels will create more capacity for new and diverse programming.

Still, the magnitude of this merger warrants strong protections. Thus, it should only be approved subject to three conditions.

First, the new company should make available to its consumers a la carte and tier programming choices.

Second, the new company should ensure program diversity by making available 5 percent of its capacity for noncommercial, educational, informational programming. This would resemble section 335 of the Communications Act, which requires DBS providers to reserve 4 percent to 7 percent of their channel capacities for such uses.

Third, the new company should be prohibited from raising prices for 3 years after the merger is approved.

I would like to conclude by raising two other concerns.

First, public knowledge strongly opposes any merger condition involving limitations on the ability of the consumers to record these satellite radio services. Such a condition would be tantamount to repealing the Audio Home Recording Act which specifically protects a consumer's ability to record digital music.

Second, we also strongly oppose any merger condition that would limit satellite radio from providing local programming. Broadcasters' opposition to this merger is incredibly hypocritical given their own current regulator efforts to consolidate and their desire to prevent satellite services providing local content is anticompetitive in its own right.

Even assuming that broadcasters take seriously their statutory duty to serve local communities with programming that serves their needs, there is no reason why in 2007 any media service should have a Government-granted monopoly over local programming.

Instead, Congress and the FCC should consider permitting satellite radio to provide more, not less, local programming.

To finish, I just want to add that it is curious that for an industry that claims that it wants a "level playing field," it seeks not only to restrict satellite radio and its programming but also refers to efforts to require them to pay performance royalties to artists as a tax. And this may be the only time that I agree with the recording industry, and thanks to the broadcasters we do, but I think that is an outrage and Congress should look at it.

I want to thank the Task Force again for inviting me to testify. I look forward to your questions.

[The prepared statement of Ms. Sohn follows:]



**Testimony of Gigi B. Sohn, President
Public Knowledge**

**Before the
U.S. House of Representatives
Committee on the Judiciary
Antitrust Task Force**

**Hearing On:
“Competition and the Future of Digital Music”**

**Washington, DC
February 28, 2007**

**Testimony of Gigi B. Sohn
President, Public Knowledge**

**Before the
U.S. House of Representatives
Committee on the Judiciary
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Hearing on: "Competition and the Future of Digital Music"

February 28, 2007

Chairman Conyers, Ranking Member Smith and other members of the Committee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a nonprofit public interest organization that addresses the public's stake in the convergence of communications policy and intellectual property law. I want to thank the Committee for inviting me to testify on the proposed merger of XM Satellite Radio and Sirius Satellite Radio.

Introduction and Summary

The merger of XM Satellite Radio and Sirius Satellite Radio presents a dilemma for public interest advocates. On the one hand, the only two providers of radio services via satellite, who have vigorously competed over the past five and a half years, are seeking to consolidate, immediately raising questions about the impact on prices and choice for consumers. On the other hand, this vigorous competition has led to a spending war for new and better programming, leaving both competitors weakened in a world where Internet radio, HD radio, cable radio and other multichannel music, entertainment and information services have become increasingly popular.

Some will say that XM and Sirius' current financial state is a problem of their own doing – that a service that was intended largely to provide an alternative for the strict playlists and over-commercialization of broadcast music radio spent lavishly and foolishly on radio personalities and major league sports. They will also say that allowing a merger is a government “bail-out.” I agree with both of these statements. But I do not believe that is where the focus should be here.

Instead, the salient question for policymakers is this: if this merger is simply denied, will consumers be better off? Given the financial state of both companies, their stagnating customer base and the growing competition in the marketplace, it appears likely that in the absence of a merger, both services will continue to limp along instead of investing in new and diverse programming. Might it not be better for consumers to permit the merger under conditions that provide expanded programming and pricing choice along with temporary measures to keep prices in check? After a great deal of discussion with my public interest colleagues, former regulators and antitrust experts, I believe that the latter is the best course.

Thus, the XM and Sirius Satellite radio merger should be approved only if it is subject to the following three conditions:

- the new company makes available pricing choices such as a la carte or tiered programming.
- the new company makes 5% of its capacity available to non-commercial educational and informational programming over which it has no editorial control.
- the new company agrees not to raise prices for three years after the merger is approved.

Two other points warrant mention here. The first is our strong opposition to any merger condition involving any limitations on the ability of consumers to record these satellite radio services. Such a condition would be tantamount to repealing the Audio Home Recording Act, which specifically protects a consumer's ability to record digital music.

The second is to urge Congress and the FCC to permit satellite radio broadcasters to do more, and not less, local programming. Broadcasters' opposition to this merger and to satellite radio's provision of local traffic, weather and emergency information is not only incredibly hypocritical given their own current regulatory efforts to consolidate, but is anticompetitive in its own right. Even assuming that broadcasters take seriously their statutory duty to serve local communities with programming that serves their needs (and not just traffic and weather), there is no reason why, in 2007, *any* media service should have a government-granted monopoly over local programming.

Whether the Proposed Merger Would Survive Antitrust Scrutiny is a Close Call and Warrants Thorough Analysis

Let me say at the outset that I am not an antitrust expert. Luckily, I have several colleagues who are. After conferring with them, I can only conclude that the antitrust questions raised here are very complex and ultimately depend on information to which Public Knowledge does not have access.

Take, for instance, the critical question of what would be the relevant product market. If one views the relevant market solely as satellite delivered radio service, the proposed transaction could be characterized as a "merger to monopoly," which would

strongly suggest outright rejection. Some of my public interest and academic colleagues, whom I respect enormously, do just that.¹

On the other hand, if, as I believe, the market is defined more broadly to include a wide variety of radio, mobile, and multi-channel music services, a regulator might reach a very different result. Indeed, XM and Sirius' services overlap with and have effects on several different markets (including video, if you include their feeds of cable shows). Competitors in these markets would include over-the-air broadcast and HD radio, Internet radio services, cable (and DBS) radio, and wireless phone music and services like Sprint Radio, MobiTV, and V-Cast, as well as podcasts that can be downloaded onto MP3 players.

A more broadly-defined market would include all of the services to which consumers would readily turn if satellite radio prices were raised. Anecdotal evidence suggests that there is no shortage of substitutes. On the other hand, we cannot ignore the fact that there are real differences between satellite radio and its competitors.

For instance, an audiophile colleague of mine is puzzled over my love of satellite radio because he receives all the new music he wants (for free) from Internet radio. In addition to providing highly diverse and specialized programming, Internet radio is becoming more mobile, and as a result is becoming a viable competitor to satellite radio.²

¹ For example, one analyst argues that if XM and Sirius did constitute an entire market, there should be evidence that they are engaging in oligopoly-like behavior, and reaping similar profits. The fact that they are both losing money suggests otherwise. Blair Levin, Rebecca Arbogast, & David Kaut, "XM-Sirius Review: Government Approval Close Call But More Likely Than Not", STIFEL NICOLAUS TELECOM, MEDIA & TECH Regulatory, Feb. 20, 2007.

² A number of mobile carriers are currently providing streaming audio, video, and data to the mobile phone handsets they sell, generally on an exclusive basis between the wireless and content providers. This content is provided to the subscriber for a fee, typically in addition to wireless data fees, as these services

However, wireless music and program services still may not have the higher-quality sound offered by HD or satellite radio. Podcasts, which many satellite consumers may consider an easy substitute for satellite programming, are provided via a "pull" technology, more akin to "on-demand," that the consumer picks and chooses, as opposed to satellite radio, which is a "push" technology in which the consumer has no choice over programming. And while broadcast radio is becoming a clear satellite competitor with multi-channel and with some commercial-free HD services, it is a local service that still hews to strict music playlists and is largely advertiser supported.³ Of course, a product needn't be identical to be substitutable.⁴ While intuitively it would seem that at least some of these competitors are substitutes, consumer data would be most helpful to answer this question.

In the end, whether or not the merger is approved should depend upon its effects for consumers and for the market. If, for instance, the merger increases net efficiencies through the sharing of expensive infrastructure, or if the merger prevents one company's assets from being lost altogether, then these factors would favor approval. We look forward to the antitrust authorities' thorough analysis of the merger's impact on consumers.

are usually IP based. Verizon's VCast provides entertainment, sports, news, and weather video clips, music downloads, and mobile data; Verizon is also employing new MediaFLO technology to directly distribute content to handsets, apart from their data-based network. Clear Channel and MobiTV are exclusive providers of streaming audio and video content to Cingular subscribers. Sprint Mobile currently provides a number of streaming radio channels, from Music Choice, Rhapsody, Sprint Radio, and Sirius; it is also aiming to provide more competition for high-speed data and competitive video streaming with WiMax technology.

³ As evidenced by its appearance here today and its immediate negative reaction to the merger announcement, there is little doubt that the broadcast industry views satellite radio as a substitute.

⁴ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956). Although each of these products differs in the technical and legal details of how a user receives audio content, the various products are still competitors to the extent that consumers could migrate from one to another due to a change in price.

The Proposed Merger Would be in the Public Interest if it is Subject to Conditions Which Promote Diversity, Preserve Consumer Choice and Keep Prices in Check

Should the merger survive antitrust scrutiny, the public interest would be served by permitting the merger subject to conditions that promote diversity, preserve consumer choice and keep prices in check.

I reach this conclusion for several reasons. First, over the past several years, both companies have consistently lost money and subscriber growth has slowed,⁵ which makes it less likely that they will take a chance on alternative programming or programming provided to under-served communities. For example, in 2005 XM dropped almost all of its world music channels, including one channel devoted entirely to African music. Around the same time it dropped its more alternative Spanish music programming, opting for more popular Spanish fare. The high fixed costs of operating a satellite service will make it difficult for each service, with its relatively small subscriber base, to take chances on such programming and/or lower prices. Combining the subscriber base of the two companies would allow the new company to leverage those fixed costs more efficiently across that larger base, reducing the cost per subscriber and facilitating the purchase of new programming and/or lower prices.

Second, consumers would be served by gaining access to channels that they could not receive unless they subscribed to both services. No longer would a consumer have to choose between Major League Baseball and the National Football League, Martha Stewart and Oprah or National Public Radio and XM Public Radio (which features the

⁵ See, e.g., Craig Moffett, "XMSR and SIRI: Where to from here?" BERNSTEIN RESEARCH, Feb. 20, 2007, 8-13 (detailing loss in revenues and subscriber growth for both companies). See also Richard Siklos and Andrew Ross Sorkin, "Merger Would End Satellite Radio's Rivalry," N.Y. TIMES, available at <http://www.nytimes.com/2007/02/20/business/media/20radio.html> (noting combined \$6 billion in losses and slower-than-expected growth).

still popular former NPR personality Bob Edwards). Moreover, to the extent that the new company will eliminate duplicative channels, there will be more capacity for new and diverse programming (which could even include video programming). In addition, as discussed below, we would urge the FCC to permit the new company to provide increased local programming, including news and public affairs, which would directly compete with over-the-air broadcast radio.

Even with these consumer benefits, the magnitude of this merger warrants strong protections that ensure greater program diversity, promote consumer choice and keep prices in check. Thus, the merger should only be approved subject to the following three conditions:

- *Consumer Choice.* The new company should make available to its customers either a la carte or tiered program choices. For example, the company could make a music tier or a sports tier available to consumers, which would cost less than subscribing to the entire service.
- *Non-commercial Set-Aside.* The new company should make available 5% of its capacity for noncommercial educational and informational programming over which it will have no editorial control. There is precedent for this kind of non-commercial set-aside. Section 335 of the Communications Act requires Direct Broadcast Satellite providers to “reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.”⁶ This would ensure a diversity of programming choices and would permit programmers that would not normally have access to a national service to do so. As with the DBS set-aside, the new company could not fill it with programmers already on its system, and no non-commercial programmer would be able to control more than one of these channels.
- *Three-Year Freeze on Price Increases:* Because some of the services that will compete with satellite radio are still nascent (such as mobile wireless entertainment), the new company should be prohibited from raising prices for three years after the merger is approved.

⁶ 47 U.S.C. § 335(b)(1).

There is a belief among some that if this merger is approved, then no other merger involving digital media will ever be denied. But that need not be the case if the antitrust authorities and the FCC are clear that the merger is being approved based upon very specific facts and circumstances. This merger involves a national service that has become a luxury item for less than five percent of Americans. As such, approval should have no impact on any questions about any proposed consolidation of local broadcasters.

This Merger Should Not Be Conditioned on any Limits on Consumers' Right to Record Satellite Radio

For the past 18 months, the recording industry and XM Satellite Radio have been engaged in a battle over whether XM should pay an extra licensing fee for selling a receiver that allows consumers to record blocks of programming and disaggregate it into individual songs. In the alternative, the recording industry has sought to have XM embed technological protection measures that would prohibit this activity. This dispute is the subject of an ongoing lawsuit in the Second Circuit⁷ and pending legislation in the Senate.⁸

Public Knowledge is concerned that the recording industry will attempt to use the merger to limit consumers' ability to record satellite radio transmissions. Consumers have been permitted to record radio transmissions since the invention of the tape player, and that ability is specifically protected under the Audio Home Recording Act, 17 U.S.C. § 1001 *et seq.*, which prohibits any copyright infringement action

based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an

⁷ See *Atlantic Recording Corp. v. XM Satllite Radio, Inc.*, No. 06 Civ. 3733 (S.D.N.Y. Jan. 19, 2007).

⁸ S. 256, the Platform Equality and Remedies for Rights Holders in Music (PERFORM) Act of 2007.

analog recording medium, or *based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.*

Emphasis added.

The record companies have questioned whether the Audio Home Recording Act is in need of revision and repeal in light of changing technologies. While this might be a legitimate question, the place to ask that question is before Congress, not in the context of a merger. Moreover, to the extent that such a condition might be sought at the FCC, the federal courts have already ruled that the Commission has no power to require particular technological design mandates in the absence of express Congressional authority. *Am. Library Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). Nor does the FCC have the power to require XM to pay a licensing fee in exchange for the ability to sell such receivers.

The Broadcast Industry's Opposition to the Merger is Hypocritical and Anticompetitive

Moments after the proposed merger of XM and Sirius was announced, the National Association of Broadcasters announced its intention to oppose it. The trade association said it would be “shocked if federal regulators permitted a merger of XM and Sirius,” and that permitting such a merger, because it is in part based on the financial condition of the companies, would be akin to “a government bail-out to avoid competing in the marketplace.”

There are many delicious ironies in this statement,⁹ but perhaps the most salient to this discussion is that as we speak, the broadcast industry is seeking FCC relief in order

⁹ See <http://www.publicknowledge.org/node/836>.

to consolidate. And perhaps the primary rationale for requesting that relief is the supposedly uncertain and deteriorating financial state of the broadcast industry.¹⁰

It is no secret that the broadcast industry is opposing this merger for the purpose of obtaining conditions that would further limit satellite radio from providing local programming, including weather, traffic and emergency information. Indeed, it has recently renewed an effort to get Congress to place such limits on satellite radio.¹¹ In other words, in order to save local radio, the NAB seeks to prohibit more local radio.

Any conditions on the merger that would limit satellite radio from providing local programming would be profoundly anticompetitive, and should be rejected. Setting aside the question of whether "local" broadcasters take seriously their responsibility of serving their local communities with news and public affairs programming (not just traffic and weather), there is no rationale for shielding broadcasters from competing for local viewers and listeners. Indeed, rather than limit such competition, Congress and/or the FCC should permit satellite radio and other national services to provide more, and not less, local programming.

Conclusion

The proposed merger of XM Satellite Radio and Sirius Satellite Radio raises complex antitrust questions. If these questions are resolved in favor of the merger, Public

¹⁰ See, e.g., Shira Ovide, "Clear Channel's Profit Declines 54%" *WALL STREET JOURNAL*, Feb. 24, 2007 at A6; Associated Press, "Earnings Preview: CBS Corp." available at <http://www.chron.com/disp/story.mpl/ap/fin/4583381.html>, Feb. 26, 2007 (noting losses in the "troubled radio unit," apparently caused by "stagnation in the overall radio market"); Comments of the National Association of Broadcasters, FCC Quadrennial Ownership Review, MB Docket No. 06-121 (Filed Oct. 23, 2006) 29-35 available at <http://www.nab.org/Content/ContentGroups/Legal/Filings/2006/QuadrennialOwnership2006Final.pdf> ("In sum, the combination of competition from cable, satellite, the Internet and other digital technologies is forcing broadcasters to fight even harder in the advertising marketplace.").

¹¹ See H.R. 983, the "Local Emergency Radio Service Act of 2007".

Knowledge believes that with conditions that protect consumer choice, promote diverse programming and keep prices in check, the transaction is in the public interest. I would like to thank the Committee again for inviting me to testify and I look forward to any questions you might have.

Mr. CONYERS. Thank you so much.
 Mr. Cooper, welcome.

**TESTIMONY OF MARK COOPER, DIRECTOR OF RESEARCH,
 CONSUMER FEDERATION OF AMERICA**

Mr. COOPER. Thank you, Mr. Chairman, Members of the Task Force. I appreciate the opportunity to testify on the proposed merger between XM and Sirius.

Ms. Sohn wants to regulate the resulting monopoly. We haven't yet given up on competition. The merger of the only two satellite subscription radio companies should raise a red flag for both antitrust officials and communication regulators whose job it is to promote competition and consumer choice in the marketplace.

Not only are XM and Sirius prohibited from merging as condition of their licenses, the growth of satellite subscription at very substantial monthly charges and consumer equipment costs over the past few years demonstrate that this is a service which in fact can be distinguished quite clearly from other things that are out there.

We believe companies who seek to merge so soon after they came into existence after they promised not to merge, after they demonstrated that subscription can gain a significant audience, carry an enormous burden to show that regulators should abandon the normal rules of antitrust oversight to allow such a merger as this, a merger to monopoly.

We remain unconvinced by the excuses we have heard to justify this merger. The product in geographic characteristics of satellite radio are easily identifiable. Satellite is national, mobile, and programmed. Those are the essential characteristics. You have added two more today, Mr. Chairman, or Ranking Minority Member. There are generally advertising-free and content-unrestricted.

They have put products in the world that are require consumer purchases of large bundles of over 100 channels. The alternatives that the companies suggest or substitute do not possess these characteristics. This is a unique set of characteristics and further entry into this market is limited by the need to have a license to broadcast over a spectrum that can get the job done. There are only two such licenses.

Consumer switching costs are substantial. This is a classic case of a distinct product with competitive problems. Two is not really enough for good competition. Remember, there is an expression in economics: Four is few, and six is many. We are talking about two and three in most cases these days.

The track record of inter-modal competition disciplining competitive use is poor at best. Bank shot competition, where people compete indirectly with badly matched products, has not disciplined pricing abuse. I submit that cable TV is a perfect example where satellite and over-the-air have failed to protect the consumer from abuse. Head-to-head competition is what gets the job done. Inter-modal competition is a very, very poor second best.

The suggestion that free over-the-air radio will discipline price increases is ludicrous. They raised prices a few years ago by 30 percent. Free over-the-air didn't do it when they were competing head-to-head. What makes you think it is going to discipline prices

when they aren't even competing head-to-head with well-matched products?

Perhaps the most outlandish of all the claims being circulated by the merging parties is the argument that consumers will be better off with a benevolent monopolist than vigorous competitors. We reject that ultra-short-term view. In that view, competition is defined as wasteful since redundant facilities lie unutilized. Monopolists' claims to serve everyone while using fewer resources and promising not to abuse the resulting market power.

Without the stick of competition, however, the costs savings simply will not be passed through to consumers and innovation will slow rather than speed up. It is competition that is the driver of innovation in our economy; competition is the best form of consumer protection. And head-to-head competition is the best form of competition.

Offers of conditions on this merger really, we don't give much credence to. The recent track record of conditions on mergers has been abysmal and the satellite radio industry has already demonstrated that the promises and commitments it makes to interoperability, to noninterference, to nonuse of terrestrial repeaters, all shows that they will be difficult to oversee if we adopt that approach.

So we are not talking conditions anymore. We want to give competition a chance. If the authorities change their mind, we will have plenty time to figure out what conditions should be imposed.

Finally, a satellite radio merger to monopoly is to really about an avalanche of mergers. If the antitrust authorities in Federal communication oversight adopts such a loose definition of products and markets to allow a merger to monopoly on the basis of inter-modal competition, then a tsunami of mergers will ripple through the digital products space at the worst possible moment. From our point of view, there is a humongous hurdle that the merging parties have to overcome and they haven't even begun to put facts on the table that would lead us to believe there is any way to make this a socially responsible merger.

Thank you.

[The prepared statement of Mr. Cooper follows:]



**STATEMENT OF DR. MARK N. COOPER
DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA**

ON BEHALF OF

THE CONSUMER FEDERATION OF AMERICA,

CONSUMERS UNION,

AND

FREE PRESS

ON

COMPETITION AND THE FUTURE OF DIGITAL MUSIC

**BEFORE THE
INTELLECTUAL PROPERTY TASK FORCE
OF THE
HOUSE JUDICIARY COMMITTEE**

FEBRUARY 28, 2007

Consumers Union,¹ Consumer Federation of America,² and Free Press³ appreciate the opportunity to testify on the proposed merger between XM Radio and Sirius. The merger has profound short- and long-term implications for consumers and for antitrust policy as a whole. If this merger is approved by the Federal Communications Commission and the Department of Justice, the Committee should bar DOJ's door because there will be little justification for denying any future merger to monopoly in the entire communications/media product space.

The proposed merger of the only two satellite subscription radio companies -- XM and Sirius Radio -- should raise a red flag for both antitrust officials and communications regulators whose job is to promote competition and consumer choice in the marketplace. Not only were XM and Sirius prohibited from merging as a condition of getting their licenses to use the public airwaves to deliver their services, the enormous growth of satellite subscription radio service at very substantial monthly charges and consumer equipment costs over just a few years demonstrates that this service is, in fact a distinct product and could develop into a vibrant competitive market. CFA and CU believe the companies who seek to merge so soon after they began competing and offering consumers innovative new services; so soon after they demonstrated that subscription radio is attractive to consumers and could be much more

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to Provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

² The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

³ Free Press is a national, nonpartisan organization with over 350,000 members working to increase informed public participation in crucial media and communications policy debates.

so with consumer-friendly pricing; and in total disregard of the licensing conditions they accepted in order to use public resources carry an enormous burden to demonstrate why public officials should abandon all normal rules associated with competitive markets and spectrum licensing to allow this merger. CFA, CU, and Free Press have seen no evidence to support such a showing and therefore urge the DOJ and FCC to reject this merger unless and until XM and Sirius present clear-cut facts demonstrating how consumers will benefit from less satellite radio competition.

This merger raises the most fundamental issues in antitrust and poses a substantial threat to consumers and competition. In order to exercise their responsibility under the antitrust law, the federal agencies must start from the assumption that the XM-Sirius merger is a merger to monopoly — a merger between the only two firms in the market for national subscription radio service. The product and geographic market characteristics of satellite radio are easily identifiable and quite distinct from other mobile and stationary listening products. It is national, mobile, programmed radio entertainment. The two service deliver and require consumers to purchase huge bundles of well over 1000 channels. There are two, and only two, entities providing such a service. The alternatives the companies suggest are substitutes do not possess this set of characteristics and, therefore, cannot be said to compete directly with the service. Entry into this market is restricted by the need to have a license to broadcast at frequencies that enable the service to be provided nationwide. Consumer switching costs are substantial. The original licenses were issued under strict conditions that the two entities are not allowed to merge. There is no circumstance more concerning from the point of view of the antitrust laws and the 1996 amendments to the Communications Act than a merger within a distinct product market that takes the number of competitors from two to

one. Merger to monopoly is antithetical to the antitrust laws, perhaps the worst offense against the basic principle that competition is the consumer's best friend.

Having launched their investigation from this obvious and appropriate starting point, antitrust and Communications Act authorities will no doubt hear all sorts of excuses about why they should allow this monopoly to be created. Indeed, we have already heard them in the media from the army of public relations specialists and lobbyists that the merging firms have hired. But, in the post-Abramoff era, lobbying muscle and political influence can no longer be allowed to short circuit careful analysis of the market structure or trump clear threats to the public interest. The proponents of the merger should bear a very heavy burden in an objective and transparent review at both the Department of Justice and the Federal Communications Commission to justify such a clearly anticompetitive and anti-consumer merger.

We remain unconvinced by the excuses we have heard offered to justify the merger.

The claim that national subscription radio service competes, indirectly, with a variety of partial substitutes is suspect. The track record of intermodal competition disciplining anticompetitive abuse is poor at best. "Bank shot competition" – the claim that partial or poor substitutes that are fundamentally different than the target product – has failed to protect consumers in similar situations and the result of relying on such competition in both merger and regulatory reviews has been rising prices and stagnation.

A perfect example is cable television. In the 1980s, the FCC claimed that cable TV competed with over-the air broadcasting. Based on that understanding, the FCC chose to deregulate cable systems in communities with three or more broadcast signals. Cable rates subsequently skyrocketed. By the late 1980s the failure of this intermodal competition to

discipline cable pricing was so obvious that the FCC proposed to increase the number of over-the-air stations necessary to represent effective competition to six. Seeing the results of this failed policy, Congress re-regulated cable for a short period in the early 1990s. It also set conditions to help DBS satellite compete against cable (another form of intermodal competition).

In the decade after the Telecommunications Act of 1996, which largely deregulated cable rates, intermodal competition between cable and satellite failed to discipline cable rate increases. Average monthly cable bills have doubled since the 1996 Act. In short, intermodal competition from neither over-the-air TV nor from digital distribution disciplined cable rates. The former had more limited channel capacity; the latter had greater channel capacity. It did not matter. The empirical evidence from the cable space is clear. Only head-to-head competition delivers relief from anti-consumer, anticompetitive pricing.

In the satellite radio service product space, we face a similar configuration of products. Traditional broadcast radio, digital Internet distribution and mobile handheld devices, like iPods, that allow consumers to store and play music from their own collections or from online music sites are touted as the intermodal competitors that will discipline prices. Yet there are distinct differences in product quality, listener experiences and mode of delivery. The touted competitors are not national, not mobile or not programmed. Experience and careful analysis suggests that the effort to position satellite radio as merely one product option in a broader product market should be rejected.

Consumers in the satellite radio space are afflicted by the very same pricing practices that afflict consumers in the cable space. Not only are prices high, but also the consumer is offered only large bundles of channels over which they have no choice. Consumer choice and

consumer sovereignty are denied. In a product market where the marginal production cost of adding subscribers is almost zero, the bundling strategy is irrational and anti-consumer.⁴ The merger promises to make matters worse, with large capacity systems leading to larger consumer bundles. The merging parties have suggested they may provide consumers greater choice over the channels they pay for if the merger is approved. But they are not now prevented from doing so and it is unclear that even if the merger is approved the merging parties will offer true choice — that is channel-by-channel selection options for consumers.

The suggestion that fcc, over-the-air radio will discipline pricing abuses after the satellite radio firms merge to monopoly, even though it did not restrain their pricing practices when they faced head-to-head competition, is ludicrous on its face. Claims that existing or emerging distribution systems, like cell phone or Internet radio, will discipline the satellite radio monopolists pricing practices are equally suspect. The iPod has been around for a while, and phenomenally successful, but it sells a very different service and its existence did not discipline satellite radio pricing practices when there was head-to-head competition. There is no reason to believe that it will do a better job if a satellite radio monopoly is allowed to come into existence. Cell phone firms engage in equally anti-consumer, anti-competitive practices on their closed networks. The dominant national cell phone operators are also the dominant regional Internet Service Providers (AT&T and Verizon), and they have made it clear that they intend to extend the worst discriminatory practices from the cell phone and cable worlds to the broadband networks. Consumers can hope for little relief from this quarter.

⁴ The marginal production costs are certainly very low, if not zero, but we are told that the marginal transaction costs (i.e. customer acquisition costs) are high. However, it appears that this problem is a function of the bundling strategy. Having set such a high threshold price, the companies are forced to market aggressively to much narrower market segment.

The claim that these are failing firms that have not yet found an equilibrium in a new market does not answer the fundamental public policy questions. And mismanagement should not be an excuse for monopoly.

Management has made some pretty obvious mistakes. They mortgaged their future in a bidding war for talent that has placed an unnecessarily heavy burden on the enterprise and then tried to recoup that mistake by high and rigid, big-bundle pricing. They have pursued this rigid, big-bundle high-price strategy in an industry where the marginal cost of adding subscribers is low (excluding so called customer acquisition and purported equipment-subsidy costs). Having driven costs through the roof on the supply-side and restricted demand with anti-consumer pricing on the demand-side, the companies now plead poverty and seek monopsony power over content providers and monopoly power over consumers in the national, mobile radio market.

Although the specific product is new, having been made possible by recent technological advancement, it has achieved a size establishes it as a distinct product and makes it worthy of public policy attention. Annual revenues exceed \$1 billion per year. Abuse of market power in this space could impose a substantial cost on consumers.

Perhaps the most outlandish of all the claims being circulated by the merging parties is the argument that consumers will be better off with a benevolent monopolist than competition. In this ultra-short term view, competition is defined as wasteful, since redundant facilities lie unutilized. The monopolist can serve everyone while using less resources and the monopolist promises not to abuse the market power that would result. Without the stick of competition, however, the cost savings simply will not be passed through to the consumer.

Indeed, the increase in market power will allow the post-merger monopoly to raise, rather than lower prices.

The promise of benevolent monopoly is not worth the paper it is written on. The merging parties suggest the merger will increase consumer choice by giving consumers more than the 130 to 170 channels now available to them by consolidating their offerings, omitting the duplicative offerings while retaining highly demanded and niche channels — these are options that consumers can only have to date by subscribing to both services and buying two radios. Yet there is little discussion that of the fact that it is the parties' own practices that have denied consumers choice in the past. Despite requirements by the FCC and the terms of their own patent dispute settlement to develop and provide interoperable radios that would have allowed consumers to switch providers without switching equipment, the companies have failed to meet that commitment. Now, we're told dual platform radios are on the cusp of development and will allow consumers to receive both signals simultaneously easing technological challenges of the merger. But technology that allows consumers to switch services or subscribe to both if they choose should have been available independent of a merger. Yet instead of promoting consumer choice, the merging parties have forced consumers to invest in equipment that works with just one service, and once so invested, are stuck with that choice.

The desire by telecommunications service providers to lock consumers into their service by developing equipment that works only with their service and engaging in exclusive manufacturing arrangements is not new. This is a dominant practice by both cell phone providers and cable providers. Here, greater enthusiasm by the merging parties for interoperable and dual platform radios prior to the merger would have facilitated the very

choice they now purport to offer consumers under the merger but *without* the necessity of a merger. It's important to point out that in their discussion of consumer choice, the merging parties fail to consider the loss of choice between the two providers as a meaningful one. The two parties have not, as a matter of business practice, offered consumers the most fundamental choice – which channels to pay for. They stuck to a high-priced, high volume bundle, which is anti-competitive and anti-consumer.

Moreover, under the scant details released to date, it remains unclear what additional equipment costs will be imposed on consumers as a result of the merger and whether, if consumers fail to invest in additional equipment, they will enjoy benefits the parties purport to provide to their subscribers.

Because this is a unique product market, once the competition is eliminated, prices will rise and no commitments have been made to the contrary. More importantly, the primary driver of innovation and progress in both programming and technology – competition in the market – will be eliminated. Innovation will slow to the pace preferred by the monopolist and consumers will be much worse off in the long run. This is a Faustian bargain that America rejected over a century ago when we affirmed our commitment to competition by enacting the Sherman Act. The short-term benefit of a monopolist who is subject to political oversight is simply not worth the long-term costs of abandoning the competitive engine of economic progress.

Offers of conditions on the mergers should also be taken with a grain of salt. The recent track record of conditions has been abysmal and the satellite radio industry has already proven that it cannot be trusted to live up to conditions imposed on it. Let us be clear. The licenses were issued subject to the condition that the licensees never merge. Yet here they are

asking to be excused from that condition. The licensees promised to offer the public interoperable radios that would work with on both networks. Yet, ten years have passed and there is no such interoperability. We are told interoperable radios have been developed but are too costly and thus manufacturers will not install them. Yet we have no ability to verify whether the lack of commercial availability of interoperable radios is due to cost, is the result of technical barriers, or instead is a strategic decision to impose barriers to prevent consumers from switching services. The parties have violated conditions about non-interference and use of terrestrial repeaters. In short, from day one they have failed to meet the conditions of their licenses and the public has suffered as a result.

This merger has such a high threshold to pass that at this stage of the merge review, we refuse to play the merger condition game. If the antitrust and regulatory authorities are diligent in the merger review process, they will turn up a host of competitive, pricing, bundling, contractual, and equipment issues and practices that counsel denial of the merger. If, in spite of that clear message, they choose to allow the merger, there will be time to craft meaningful conditions with strong, automatic enforcement mechanisms, so that the dismal record of recent merger conditions is not allowed to repeat itself.

A satellite radio merger to monopoly is about an avalanche of mergers. There was a key moment a decade ago when the Department of Justice decided that a large monopolist is no worse than two smaller monopolists and allowed the Bell Atlantic-NYNEX merger to go forward. That decision opened the door to a wave of mergers that doomed head-to-head competition in telecommunications. The old telephone monopoly was recreated as two huge geographically distinct monopolies that rarely if every compete.

A satellite radio merger to monopoly will perform a similar bellwether function. If the agencies with oversight adopt a loose definition of products and markets and allow a merger to monopoly on the basis of intermodal competition, then a tsunami of merger will ripple through the digital space at the worst possible moment. The firms that have declared their undying hostility to the open flow of products in the digital economy (broadcasters, telephone/cellular companies, cable companies), will be empowered to capture and stifle the alternatives, under the premise that every media and telecommunications product competes with all others and that new technologies and services will come along to protect the consumer in any case. That relief, however, will be slow and insufficient because the competitive core of the digital economy will have been damaged and the critical terrain of the digital economy will be controlled by entities who have the same anticompetitive anti-consumer objectives as the merging parties in this case.

Mr. CONYERS. Thank you, Mr. Cooper.

Mr. Biggio, we welcome you for your testimony at this point.

**TESTIMONY OF CHARLES BIGGIO, WISON, SONSINI,
GOODRICH AND ROSATI**

Mr. BIGGIO. Thank you. I would like to thank the Chairman, Ranking Member Chabot, Ranking Member Smith, for the opportunity to testify on the antitrust aspects of the merger between XM and Sirius.

This merger obviously raises important policy and law enforcement considerations, but whether the combination of XM and Sirius is a two-to-one merger to monopoly or a merger in a much larger market is a question of fact, and right now we don't have the facts necessary to determine the legality of the merger.

The facts will come out. However, merger review is essentially a law enforcement exercise and the enforcement agencies, the Antitrust Division in particular, along with the Federal Communications Commission, are best equipped to find the relevant facts and my recommendation is that no firm conclusions be formed about this merger until the agencies have completed their review.

It is important to note that a merger need not create a monopoly in order to violate section 7 of the Clayton Act. At the same time, a merger that results in very high market shares and high market concentration does not automatically violate section 7.

Mergers in concentrated industries can be lawful if the market conditions are such that the merger would in fact have no anti-competitive effect. So the XM-Sirius merger may violate section 7 even if it turns out not to be a two-to-one merger to monopoly. And at the same time, it may pose no competitive threat, even if the market ultimately is defined as highly concentrated.

The evaluation of this merger will start with an evaluation of the nature of competition between XM and Sirius. They have been vigorous competitors and it is fair to ask the question of whether eliminating the competition will lead to higher prices or lower quality. In answering this question, the Antitrust Division and the Federal Communications Commission will look at how competition between the two services has affected price and quality and then ask whether the other alternatives advanced by the parties are likely to produce the same competitive outcomes.

The key question is whether the competition between XM and Sirius is the factor determining the subscription price for the two services and the quality of the product being offered, or whether some or all the other alternatives will provide a comparable competitive check.

Now, ordinarily markets are defined narrowly to include only those products that have a meaningful impact on price. Mergers between close competitors or next-best substitutes are usually problematic because other products may not be sufficiently viable substitutes to impose a significant price constraint. Once the close substitutes merge, there may be substantial room for price increases before the pricing constraint offered by a more remote substitute kicks in.

The key aspect of merger analysis is identifying the best consumer to test the significance of possible competitive substitutes.

Markets are defined by the marginal consumer. Thus, even if many consumers would not substitute away from satellite radio to some other product in the face of a price increase, the market could still be defined broadly to include other products if enough marginal satellite radio customers would switch. And the key point is that the marginal customers need not be predominant in order for the market to be defined broadly.

We all have our own individual views of what we would do or wouldn't do if prices for satellite radio would go up after this deal. It is a classic problem in merger review, to substitute anecdotal and subjective opinion for hard evidence. The real answer lies in a rigorous economic evaluation of whether enough consumers would switch in the face of an effort to raise prices post-merger. It is a highly technical question that the parties and the Antitrust Division and the FCC can work out during the investigation.

I would also like to comment quickly on some of the possible benefits of the merger that Mr. Karmazin has outlined in his statement. I agree that these benefits, if substantiated and shown to be possible only through the merger, would weigh heavily in favor of the deal. However, in making their merger benefits case, I think the parties would have to answer some pretty tough questions.

First, Mr. Karmazin contends the merger will increase choice, but the parties will have to explain how choice is increased when the merger will eliminate one of the key choices now available. The parties will have to explain how competition in some important way is an impediment of choice, because ordinarily competition maximizes choice.

In particular, the parties argue that the merger will allow subscribers to get XM and Sirius content with one subscription, but they will have to explain why the differentiation between XM and Sirius is a bad thing that can be fixed only by the merger. Ordinary, the kind of exclusive deal that makes Howard Stern available only on Sirius is justified because the exclusives are the best way for a competitor to add subscribers. But here the argument seems to be that the marketing strategy requiring exclusive content is actually impeding subscriber acquisition.

If so, the parties will have to explain why the merger and not the elimination of exclusive programming is the only way to achieve this benefit. And the parties will have to explain why having a single firm bundle content into differentially priced tiers is better than having competing firms with differentiated content.

The competitive significance of the consumer being able to get the full range of content from a single firm cannot be evaluated without also understanding how that single firm will bundle and price that content after the elimination of a competitor.

Ultimately, XM and Sirius will have to articulate merger benefits that the two firms could not have achieved themselves as independent firms competing in the marketplace. While there appears to be plausible efficiencies that will be generated by the merger, some of the claimed benefits will need to be further evaluated.

The best way to get the answers to these questions will be through the merger review process conducted by the Department of Justice and the Federal Communication Commission, by looking at the real world factors that go into the marginal consumer's calcula-

tion of what he or she will pay for satellite radio. And the evidence will come from the parties' documents and an evaluation of how and why consumers choose to spend their money on satellite radio.

Thank you very much. I would be glad to take any questions.

[The prepared statement of Mr. Biggio follows:]

STATEMENT

OF

**CHARLES E. BIGGIO
WILSON SONSINI GOODRICH & ROSATI, PC**

BEFORE THE

**ANTITRUST TASK FORCE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

COMPETITION AND THE FUTURE OF DIGITAL MUSIC

FEBRUARY 28, 2007

Mr. Chairman, I am Charles E. Biggio, a partner in the law firm of Wilson Sonsini Goodrich & Rosati. I would like to thank the Chairman, the Ranking Member and the Members of the Committee for inviting me to testify on the antitrust aspects of the merger between XM and Sirius. I have practiced antitrust law for over 20 years, including three years (from 1995 to 1998) at the Antitrust Division of the Department of Justice, first as Senior Counsel to the Assistant Attorney General and then as Acting Deputy Assistant Attorney General. My focus both in private practice and at the Antitrust Division has been merger review. While at the Antitrust Division, I devoted substantial time to the wave of radio mergers that followed the enactment of the 1996 Telecom Act.¹

This merger raises important policy and law enforcement considerations. There is no doubt that XM and Sirius have been vigorous competitors for subscribers, talent and distribution. Indeed, I do not understand the parties to be arguing that the merger should be approved because XM and Sirius do not compete. Moreover, XM and Sirius sell something that is different from other media, and so it is plausible that satellite radio is a market unto itself. If so, this would be a “2-to-1” merger and would be patently unlawful under existing precedent. At the same time, there can be no denying that consumers have an increasing number of alternatives vying for their listening time. It is possible that these alternatives are in the same relevant antitrust market as satellite radio. If so, this merger may in fact raise no antitrust concerns. Whether the combination of XM and Sirius is a “2-to-1” merger or a merger in a much larger market is a question of fact. Right now, we do not have all the facts necessary to determine the legality of the merger.

¹ Although in private practice I have represented various terrestrial radio firms from time to time, I am providing this testimony on my own behalf, and not on behalf of any client.

The facts will come out. The facts developed at hearings, like the one held here today, will help the process along. However, merger review is essentially a law enforcement exercise, and the enforcement agencies – the Antitrust Division in particular, along with the FCC – are best equipped to find the relevant facts. My recommendation is that no firm conclusions be formed about this merger until the agencies have completed their review.

I outline below the antitrust principles applicable to this merger and try to identify the key issues that should be examined in evaluating whether the XM/Sirius merger is likely to harm consumers.

HSR Procedure

This merger, like most substantial M&A transactions, is subject to the pre-merger notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. XM and Sirius must provide notice to the Antitrust Division of the Department of Justice and the Federal Trade Commission. Although the Antitrust Division and the FTC share merger enforcement responsibility as a general matter, I expect that the Antitrust Division, and not the FTC, will review this transaction, given the Antitrust Division's prior experience with similar mergers (e.g., DirectTV/Echostar and numerous terrestrial radio mergers).

The initial waiting period under HSR will be 30 days. Given the obvious competitive overlaps between XM and Sirius, I expect the Antitrust Division at the end of the initial waiting period to issue a request for additional information – a so-called Second Request – to both XM and Sirius. The issuance of a Second Request defers the ability of the merging parties to consummate their transaction until 30 days after they

have provided the Antitrust Division with the requested information. Ordinarily, it takes at least several months to comply with a Second Request. After all waiting periods have expired, HSR would no longer prevent XM and Sirius from completing their merger. However, as a practical matter, the timing of the HSR process will be determined by the timing of the FCC's review. The FCC's review is not limited by the 30-day waiting periods provided for by HSR. Thus, the parties do not have the ability to put the FCC "on the clock" as they do with the Antitrust Division. Consequently, the timing of the Antitrust Division's review of this merger likely will be determined by the review timeline at the FCC.

As a technical matter, both the FCC and the Antitrust Division have the authority to apply Section 7 of the Clayton Act to mergers that are subject to FCC jurisdiction. In the past, the Antitrust Division and the FCC have worked together closely; however, as the primary enforcer of the antitrust laws, the Antitrust Division in most cases has taken the lead in analyzing the antitrust aspects of a merger. The FCC does apply a broader public interest standard in its review of mergers. However, while the FCC has obtained additional relief in connection with some transactions, I am not aware of a recent case in which there was substantial disagreement between the Antitrust Division and the FCC over the antitrust aspects of a merger. As with prior merger reviews, I would expect that the two agencies will cooperate in their review of the antitrust aspects of this transaction.

Merger Enforcement Standards

In reviewing mergers, the Antitrust Division applies Section 7 of the Clayton Act, which prohibits the acquisition of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such

acquisition may be substantially to lessen competition, or to tend to create a monopoly.” Merger enforcement standards are forward looking. Although historic performance in an industry often provides relevant evidence, the primary focus is to determine the likely competitive effects of a proposed merger in the future.

The ultimate question the Antitrust Division will ask in reviewing the XM/Sirius transaction is whether the transaction will create or enhance market power; that is, whether it will cause prices to go up, output to go down, or quality or technological development to deteriorate in a relevant market affected by the transaction. The analytical framework used by the Antitrust Division (and generally supported by case law) to answer this question is embodied in the *1992 Horizontal Merger Guidelines* (the “Guidelines”), which were issued jointly by the Antitrust Division and the FTC. Under the Guidelines (and the case law), a transaction is presumptively anticompetitive (i.e., is deemed to create or enhance market power) if it creates undue market share in a highly concentrated market. Thus, the first step in analyzing the competitive impact of a transaction is to define a relevant market (which will have both product and geographic dimensions). After the market is defined, market shares and market concentration are calculated. Where post-transaction market concentration is low, or where the transaction has a trivial impact on concentration, the transaction is generally presumed to be lawful without substantial further inquiry. On the other hand, where a transaction results in high market shares in a concentrated market, the Guidelines call for a more detailed analysis to determine whether a presumption of anticompetitive effect can be overcome by the realities of the marketplace.

The so-called “competitive effects” portion of the Guidelines sets forth a variety of factors to be considered in addition to market concentration to determine whether the transaction will increase the likelihood that market participants will be able to act anticompetitively. In making this determination, the Antitrust Division will evaluate whether the transaction will actually result in higher prices, lower output levels, or deterioration in quality or technological development. These anticompetitive effects can take place either through coordinated interaction among the competitors remaining after the transaction, or through the combined firm’s unilateral exercise of market power created by the transaction. Factors relevant in determining whether the transaction will result in anticompetitive effects include, among other things, changing market conditions, ease of entry, the nature of the products under consideration, the ability of small firms rapidly to increase sales or of non-U.S. firms to increase exports to the United States, the conduct of firms in the market, the size of the merged firm in relation to other firms in the market, the intensity of competition between the products of the merging firms relative to competition with other firms, and, in some cases, the transaction-specific efficiencies (e.g., production cost savings) the transaction will generate.

Application to the XM/Sirius Merger

A single merger can have effects in multiple markets. Each affected market must be examined separately to determine whether competition might be adversely affected in that market. There are at least four distinct “markets” affected by this merger: (1) advertising, (2) distribution (i.e., automobile OEM and retail distribution), (3) content acquisition and (4) consumer subscriptions. Each of these markets has a different set of consumers and, potentially, a different set of competitors. And an anticompetitive effect

in any one of these markets would justify blocking the transaction (absent some remedial undertakings to cure the competitive concern).

Advertising. The market for advertising has been the key market of concern in the Antitrust Division's review of terrestrial radio mergers. Here, however, I would expect the advertising market to be of little concern. First, XM and Sirius do not rely on advertising as their main revenue source – they are relatively small players. Second, the market for advertising would likely include the terrestrial radio companies at a minimum and may well include other non-radio media for any national advertising XM and Sirius may sell. I note that the Antitrust Division has historically taken the position that radio advertising is in a separate market from other forms of advertising. However, this position has usually been articulated in the context of local radio advertising, not national advertising.

Automobile OEM's and Retail Distribution. XM and Sirius compete to be offered as optional or standard equipment on new cars. They also compete to be featured on the shelves of the nation's electronics retailers. I believe this market is a derivative of the market for consumer subscriptions. It would be anomalous to conclude that the merger is likely to be anticompetitive in respect of the auto OEMs and retailers, but not in respect of the ultimate consumer. In any event, there is a relatively small group of sophisticated automobile OEMs and major electronic retailers; if they do not express concerns the proposed transaction, there would be little reason to be concerned about this market.

Content. XM and Sirius compete for content, especially for exclusive content. For example, Sirius was willing to pay over \$200 million for exclusive rights to Howard Stern's program. The relevant antitrust question is whether the combined company will

be able to pay less for its content because of the merger, or will the other outlets for radio content keep the market competitive so that content providers will not be adversely affected? It may be the case that the amount of resources XM and Sirius devote to content acquisition is primarily driven by competition between the two firms. On the other hand, it is also possible that the combined company would continue to have the incentive to pay top dollar for content because it will be in competition for that content with terrestrial radio firms and other distributors of audio content, or because it must do so in an effort to entice new subscribers and keep existing ones as it tries to achieve greater consumer penetration. As with the automobile companies and the electronics retailers, firms supplying radio content are often large sophisticated firms; if they do not express concern, there would likewise be little reason to be concerned about this market.

Consumer Subscriptions. The competition between XM and Sirius for subscribers is the most important aspect of this transaction. The key question is whether the competition between XM and Sirius is the factor determining the subscription price for the two services and the quality of the product being offered. In other words, is the relevant antitrust market satellite radio (i.e., the competition between the two satellite radio services is what determines the market subscription price) or is the market broader (i.e., subscription prices are determined by the full range of listening alternatives available to consumers). Below are some of the factors that will be relevant to the antitrust analysis.²

² This analysis focuses on the relevant product market. There is also a geographic element to the relevant market. Although XM and Sirius operate nationwide, their services are purchased by consumers whose options are available locally. Thus, the geographic market may well be local, and the options available to consumers in one local market may be different from the options available to consumers in another. However, unless economically viable options are determined to be available to consumers in most if not all localities, the differing characteristics of individual local markets are unlikely to be determinative in the enforcement decision of the Antitrust Division and the FCC.

- Markets are narrowly defined to include only those products that have a meaningful impact on price. Mergers between “close competitors” or “next best substitutes” are usually problematic, because other products may not be sufficiently viable substitutes to impose a significant price constraint. Once the close substitutes merge, there may be substantial room for price increases before the pricing constraint offered by a more remote substitute kicks in.
- “Substitutes” must be distinguished from “complements”. A substitute is a product a consumer would buy instead of another one. A complement is a product a consumer would buy in addition to another product. Substitute products are competitive; complements are not. This is important because some of the products a consumer might listen to could be complements to satellite radio, and not substitutes.
- Markets are defined by the marginal consumer. Thus, even though many consumers would not substitute away from a product to another product in the face of a price increase, the market could still include the other product if there are enough marginal customers who would switch. Marginal customers need not predominate.
- Even if there are a sufficient number of marginal customers who would switch to another product in the face of a price increase, the market may still be defined narrowly if there is a well defined group of customers who would not switch and who could be charged higher prices than other consumers (i.e., if sellers can price discriminate).

The standard Guidelines analysis would suggest a rebuttal presumption that the relevant antitrust market is satellite radio. However, new products seeking a larger market presence often must compete with a more established technology, even if there is just one producer of the new product. This argument loses its force the longer the “new” product has been on the market, especially where there the new product is sold be two firms competing head-to-head. Thus, a key factual question posed by this merger will be whether satellite radio has come to the point where the gains from consolidating the subscriber bases of the two providers are more significant than the need to keep prices low in order to continue adding new subscribers.

In addition to the market definition and competitive effects analysis, the Antitrust Division and the FCC will consider the efficiencies that may be generated by the merger. To be cognizable under the Guidelines, any efficiencies must be merger specific (i.e., not attainable without the merger or through less anticompetitive means) and verifiable. In addition, efficiencies that would tend to reduce price (i.e., efficiencies that generate lower variable costs) are more apt to be recognized. Fixed cost savings, which typically do not lead to lower prices in the short term, or only credited in limited circumstances. Further, efficiencies almost never justify a 3-to-2 or 2-to-1 merger. Mergers make economic sense to for two basic reasons; the merged firm can expect increased profits either from higher prices or lower costs. The existence of efficiencies at least provides a procompetitive reason for parties to merge (although a merger can both lower costs and lead to higher prices).

Ultimately, XM and Sirius will have to articulate merger benefits that the two firms could not have achieved themselves as independent firms competing in the market

place. There appear to be plausible efficiencies that will be generated by the merger (e.g., elimination of duplicative programming, better spectrum and satellite utilization and savings in subscriber acquisition and other overhead). However, the parties' efficiencies story – even if it can be substantiated – may not be enough to justify the merger if the Antitrust Division and the FCC believe the relevant market is limited to satellite radio.

Finally, the ease with which new firms could enter the market will also be evaluated. In this case, there is a regulatory barrier to entry – an FCC license. However, even if additional licenses were available from the FCC, it appears unlikely that a new firm could enter the market and become a meaningful competitor within the two year period envisioned by the Guidelines; as the existing satellite companies have demonstrated, it is expensive and time-consuming to attract the content and customers necessary to develop a viable business in this industry.

Conclusion

A merger between XM and Sirius poses obvious competitive issues. On the one hand, the merger quite plausibly is a merger to monopoly in a satellite radio market. On the other hand, XM and Sirius will advance market definition arguments that, if supported by the evidence, provide sufficient legal basis to permit the merger to proceed. The best answer to the market definition question will be found in evaluating the real world factors that go into a marginal consumer's calculation of what he or she will pay for satellite radio. The evidence relevant to this evaluation will come from a variety of sources, including the parties' documents, past pricing behavior and an understanding of how and why consumers choose to spend their money on satellite radio.

Mr. CONYERS. Thank you so much.

Mr. Karmazin, it is all yours now. You are the final witness, and you have been referred to more than once here.

**TESTIMONY OF MEL KARMAZIN, CEO,
SIRIUS SATELLITE RADIO**

Mr. KARMAZIN. Well, thank you very much. And good afternoon.

Thank you very much, Chairman Conyers, Congressman Smith, Congressman Chabot and the Members of the Antitrust Task Force, for this invitation to talk to you about the pending merger between XM and Sirius satellite radio.

I am speaking today on behalf of both companies. With me here today is Gary Parsons, chairman of XM.

With your permission, I think what I would like to do, because I think it would be more meaningful, is to abandon my opening comments, which I will be happy to make them available to you, and spend a little bit of time talking about this merger and what we think it means for consumers and the public.

So far, I agree with everything that was said. I think it is the very early stages of this merger. I can tell you that we look forward to working with Congress, working with the regulators, and convincing everybody that this merger is in the best interest of the public.

I think that our obligation is going to be twofold. We will have an obligation to demonstrate that this merger is not anticompetitive. I hear that we will probably be working with the DOJ and I am convinced that we will give them enough information and they will get their own information to make that determination.

I can tell you for sure that satellite radio competes with the 10,000 terrestrial radio stations. We compete with over the 1,000 HD radio stations on the air today. We compete with the Internet for Internet radio. We compete with all kinds of services that, interestingly enough, weren't available at the time when our licenses were given.

So, you know, the idea of comparing where we are from a technology point of view today and comparing it to where it was 10 or 12 years ago, when statements were made, we think is sort of not very consumer-friendly because the world has changed.

So number one, we know that both with the Justice Department and with the FCC, we are going to have to convince them that this is not anticompetitive. I think even more important, if there is something more important than that, is that I believe in order to convince Congress and the regulators that this deal should be approved, is that we are going to have to demonstrate that this is in the consumers' best interest, because if we cannot convince everybody that this is in the consumers' best interest, then this merger will not be approved. And I am confident that the members of the FCC, if they didn't believe it, would not vote for it and we wouldn't get antitrust approval.

We are absolutely convinced that this merger is in the consumers' best interest. This merger will give people more choice than they have before and lower prices and, very importantly, less confusion. So if you think about the way it is today without the merger, there are two different radios that a consumer needs to

buy. It would be like buying one for AM radio and one for FM radio. But it was obviously determined that a receiver that would get both services would be in the consumer's best interest.

There is a great deal of confusion in the marketplace because they are interested, when they buy a car and they go and buy a General Motors car and that comes with an XM radio and that XM radio doesn't enable the consumer to pick up the NFL, that is not very consumer-friendly. And we believe that this merger will absolutely give the consumer more benefits.

So number one, one of the benefits will be is that no radio will be obsolete. I heard that mentioned earlier and there was a concern that the people who have bought an XM radio or they bought a Sirius Satellite Radio, those radios would be obsolete. And we can guarantee that is not the case.

We also have said that there would be more choice for consumers and we believe that by consolidating these companies, we are going to be able to offer the consumer who wants to be able to have the NFL and wants to be able to have Major League Baseball, instead of them buying two radios and paying \$25.90 a month, that they will be able to do it at a cheaper price.

So what we believe will serve the consumer's best interest would be to give them more choice. We are committed to giving the consumer more choice. Count on it. Okay?

And if you want to count on it in some other ways other than us saying it, I am sure that the FCC and the Justice Department could absolutely keep our feet to the fire on that kind of commitment.

And, number two, what we are committed to doing is offering lower prices. We are saying we are not going to raise our price and we are going to offer the consumer something that they have not had before.

So, Sirius has never, ever raised its price. We started our service, the first subscriber paid \$12.95. They are currently paying \$12.95. Our vision would be that, because we are competing with free radio, because \$12.95 has only enabled us to get 10 million subscribers nationally, we are competing with the 200 million cars that have AM and FM radio, we are competing with 109 million homes that have four radios in it. So the idea of raising a price to compete with free is bizarre and doesn't seem to work.

But you know what? Maybe you are concerned that you don't want to deal with the economics. I am telling you today that we are committed, we are committed to not raising prices and committed to in fact lowering the price. So if the consumer is going to be able to have more choice, guaranteed no price increase and be able to have an option—more flexibility for a lower price—we think that we would meet the standard of absolutely saying that this merger is in the public interest.

So I look forward to working with the regulators. I look forward to working with this Committee and I look forward to working with consumers in making sure that that they see this advantage as well.

Thank you.

[The prepared statement of Mr. Karmazin follows:]

PREPARED STATEMENT OF MEL KARMAZIN

Mr. Chairman,

Good afternoon. Thank you, Chairman Conyers, Ranking Member Smith, and members of the Anti-Trust Task Force for the invitation to talk with you about our merger with XM Satellite Radio.

I'm Mel Karmazin, the CEO of Sirius Satellite Radio. Before I came to Sirius in 2004, I was president of Viacom, and before that, president of CBS. I've spent just about my entire working life in the broadcast industry.

I am speaking today on behalf of both companies. With me here today is Gary Parsons, the chairman of XM. Gary is a veteran of the communications business, a real leader in the world of satellite radio. Gary and I are both looking forward to working together to create an exciting new company.

Gary's leadership and talent are crucial to this merger. He built XM into the success it is today. I should point out that XM has the largest digital radio facility of its kind in the country, and is headquartered right here in Washington.

We firmly believe that this transaction is essential to preserving and enhancing choice for consumers. A combined company will be able to compete more effectively in the highly competitive and rapidly evolving audio entertainment marketplace. Our new enterprise will enhance the audio industry's future.

I appreciate this opportunity to explain why we believe so strongly that this merger will benefit American consumers.

This afternoon I would like to focus on the two most important aspects of this merger:

1. How this merger will lead to increased consumer choice and lower prices; and
2. How this merger enhances competition in an already highly competitive market.

CONSUMER CHOICE AND LOWER PRICES

Since the creation of satellite radio in 1997, the consumer has been at the center of our business plan. Consumer wants and needs have brought the technology and the industry to where it is today and the consumer continues to be our number one priority. That simple but important fact will not change post-merger. The long-term success of satellite radio rests on growing our subscriber base. As a single company, we expect to provide current and future subscribers the best and most diverse audio content available.

A merged company will also give subscribers additional programming options and pave the way for even more programming. We expect that consumers will no longer have to subscribe to both services in order to receive the most popular programming. We want subscribers on both systems to be able to listen to both the NFL and Major League Baseball. Both the PGA and NCAA basketball. Both Oprah Winfrey and Martha Stewart.

Moreover, in the long-term the significantly expanded channel capacity of our merged company will give consumers access to a greater range of programming. XM and SIRIUS already broadcast a wide range of commercial-free music channels, exclusive and non-exclusive sports coverage, news, talk, and entertainment programming. In the long-term, our combined company expects to be able to expand diverse programs for underserved interests. For example, we hope to expand foreign language and religious programming.

The merger will also result in a combined focus on designing the best products and innovative services for our subscribers. By combining our research and development, we will be able to design and introduce radios and transmission infrastructure that will give satellite radio subscribers the best experience in audio entertainment. We will be able to speed the introduction of radios offering content from both of our services today—something that has been challenging as separate companies.

We anticipate that together, our radios will be smaller, lighter, simpler, and more technologically-advanced than what each company has on the market today. Over time, we will look to combine our satellite and terrestrial transmission infrastructure to deliver the broadest range of content and the highest level of service quality. Finally, we'll use our combined resources to improve upon our nascent non-audio services, like Backseat Video, real-time traffic and weather, and other infotainment-style data services. At the same time, we will accelerate the delivery of innovative services and products.

It is important to realize, however, that our individual radios will not become obsolete as a result of this combination. Any radios or other equipment that subscribers currently use will be fully supported by SIRIUS and XM. When more tech-

nologically advanced devices are ready, subscribers will make the decision to adopt them at a timing of their choice.

In summary, a merged Sirius and XM will be a boon to consumers. They will receive additional programming opportunities and choice at more competitive prices. They will have access to advanced equipment and services, but they will have the flexibility to adopt technology when they wish, secure in the knowledge that their current radio will continue to operate. And satellite audio will continue to be a viable consumer option in the modern audio entertainment marketplace—a marketplace that has undergone incredible growth and upheaval since the birth of satellite radio.

ENHANCED COMPETITION IN THE AUDIO ENTERTAINMENT INDUSTRY

We operate in an intensely competitive environment and that competition will continue to intensify post-merger—and continue to provide an inherent check on programming as well as on pricing. Our long-term success rests on growing our subscriber base, and we simply will not attract new subscribers if we are not meeting consumer expectations on price and programming.

The dynamic growth in audio technology has given consumers an impressive array of choice—a significantly broader range of audio entertainment options from which to choose than was the case when we were first granted our licenses a decade ago in 1997. Back in 1997, an eon ago in the world of technology, audio entertainment was dominated by analog AM and FM radio. Digital broadcast radio did not yet exist. The Internet was still in its infancy; with multi-channel digital broadcast radio and broadband streaming Internet audio and radio still on the horizon.

Today's options paint a stark contrast to those in 1997. Of course, satellite radio still competes vigorously with free over-the-air AM-FM radio—a service that exists in virtually every home and car in the country. That competition is becoming fiercer, as radio moves to digital broadcasts in response to satellite's appeal. But we also face growing competition for our audience from emerging audio sources, including multi-channel digital broadcast radio, wireless broadband and mobile phone streaming.

But that's just the beginning; an even wider range of new services are becoming mainstream. Wireless carriers are exploring new data and voice services as they deploy 3G and 4G networks. Multi-channel HD radio is spurring renewed growth in the terrestrial radio marketplace, with additional free programming choice. Services such as WiMAX and Media Flow are emerging as high-bandwidth, long-range content, and data transmission technologies.

It has only been 10 years since satellite radio was licensed. Could we have predicted 10 years ago that the audio entertainment marketplace would look the way it does now? One reason for all the new technological advancements is that competition in the audio entertainment market is robust. We are seeing new entrants on a regular basis as the market continues to meet the needs of the consumer. The reality is that consumers can choose from a wide range of different services and technologies that offer audio entertainment.

XM and Sirius are relatively small players in that highly competitive and rapidly evolving audio entertainment marketplace. Welterweights in an arena of heavyweights. There are 237 million vehicles in the United States, each of which offers a built-in AM and FM radio. There are another 230 million PCs in use that can access programming online, and there are 223 million weekly AM and FM radio listeners in the United States, and millions of cell phones for music listening, to programmed entertainment, music news, talk and information. Contrast that to Sirius and XM. The companies currently have about 14 million subscribers. Satellite radio is a David operating in a land of Goliaths and is hardly a threat to controlling the audio entertainment market.

But competition is healthy, and it benefits the consumer. Today when we think to ourselves, "I want to hear some of the jazz greats like Louis Armstrong, John Coltrane or Miles Davis," we have a multitude of options at our fingertips. We can turn on our AM/FM radio and tune in to a jazz station; we can log on to the Internet and find the music online; or we can turn on our SIRIUS satellite radio and tune into Planet Jazz, Jazz Café or Spa 73.

Given the expansive market—within which satellite radio is only one of many alternatives—we are certain that an accelerating level of competition will exist post-merger. There is little doubt that satellite radio faces stiff competition from many of the technologies and entertainment platforms that I have already described. In fact, I would like to note for the committee that in the SEC filings of traditional radio companies, they readily acknowledge that they compete with satellite radio in a larger market for audio entertainment.

- From *Clear Channel Communications* 2005 Form 10-K; page 24: “Our broadcasting businesses face increasing competition from new broadcast technologies, such as broadband wireless and satellite television and radio, and new consumer products, such as portable digital audio players and personal digital video recorders.”
- From *COX Broadcasting / COX RADIO* 2005 Form 10-K; page 8-9: “In addition, the radio broadcasting industry is subject to competition from new technologies and services that are being developed or introduced, such as the delivery of audio programming by cable television systems, by satellite digital audio radio service and by digital audio broadcasting. Digital audio broadcasting and satellite digital audio radio service provide for the delivery by terrestrial or satellite means of multiple new audio programming formats with compact disc quality sound to local and national audiences.”

The fact is that we are in the middle of a rapid evolution of the audio entertainment industry. Together, SIRIUS and XM can compete more effectively. We will have the capacity to expand our market by offering more compelling and more diverse content to a greater proportion of the population. Our goal is to have as many people in this country look to us as a source of content relevant to them. By combining our companies, we are absolutely convinced that we are creating a company with tremendous potential. We are confident that together we will be able to quickly and successfully integrate the two companies to deliver the greatest programming choices to our existing and new subscribers.

Our merger has resulted in one unexpected harmony. There are few—if any—issues where you'll find the LOS ANGELES TIMES, the WALL STREET JOURNAL, USA TODAY, and the CHICAGO TRIBUNE in agreement. All four newspapers found that our merger is meritorious. The LA TIMES concluded that the audio entertainment market “is very competitive, particularly among the national players.” Mr. Chairman, Ranking Member Smith, and members of the Committee, thank you for this invitation to speak with you today about the very significant consumer benefits that this merger will produce. Sirius and XM together see great opportunities, and we believe that our growth will be faster and our service offerings will be more competitive on a combined basis.

This transaction is about choice. We look forward to the day this merger is approved and we can begin to provide consumers with best-of-breed programming as well as the acceleration of innovative services and products that they desire.

I look forward to answering any questions the Committee might have.

Mr. CONYERS. Thank you very much, all of the witnesses. This has been, I think, an extraordinarily useful way to begin an examination of this proposed merger. I compliment all of you on the details that have gone into your statement and the concern.

I commend you, Mel Karmazin, for the defense that you have raised in view of their earlier discussion.

One of the considerations is, how do we enforce promises in the circumstances in which we find ourselves? This Committee won't be a party to the negotiations with the Department of Justice or the FCC, and so we are concerned about how that can happen.

The two companies compete through pricing structures. Sirius currently offers a \$500 lifetime subscription fee. How do we know that structure will remain in place in the future?

We have, unfortunately, a not-too-good-record of performance of satellite radio keeping promises. That is part of the record that I think both companies have to overcome. There is no public interoperable radio that would work on both networks. And that was promised. You violated conditions about noninterference and use of terrestrial repeaters.

How do we draw—I mean, trusting you isn't going to work here, in this—not just today, but in this longer-term of examinations that you will be going through. You have high hurdles to overcome, don't you think?

Mr. KARMAZIN. Mr. Chairman, thank you for that.

I am not asking you just to—first of all, you can trust me. But, more importantly, you need something more than that, and I am prepared to work with this Committee, work with Congress, work with the regulators, to do what you need to do to have something beyond “trust me.”

A couple of the facts are wrong and I just don’t want to get hung up on facts, but when we committed, we said that we would design and we would create the ability to have an interoperable radio. We have such a radio. It is in my office. And it is there.

The problem with it is that there is no receiver manufacturer that wants to pay to supply it, and we currently are subsidizing our radios and we are subsidizing our radios today because we get a subscription from it.

The idea of us subsidizing a radio when we may not get a subscription doesn’t make any sense for us. So we did not in any way, shape or form break that promise. We have developed, as our requirement was, a radio. We have offered intellectual property to receiver manufacturers, so if any receiver manufacturer wants to make an interoperable radio, they can make it.

The problem is, it would sell somewhere around \$700 without a subsidy, and that is why the merger could make it possible, because we can get a subscription.

Regarding the interference on the terrestrial repeaters, I could tell you that our company, when we found out that we had 11 repeaters that were not operating in accordance with our rules—okay, they were minor issues—we shut them off as soon as we found about it. These repeaters were not causing any interference. They weren’t causing any harm to consumers. They were operating at a different standard.

So we take exception to the idea of us not following the rules. It would be like saying that a broadcaster who violated the political advertising rule, who is not giving the lowest rate was fined, they don’t deserve to be a licensee. Or recently one company, a terrestrial broadcaster, paying a \$24 million—

Mr. CONYERS. Let me interrupt you here, because I wanted to find out what your opposition was to Ms. Sohn’s testimony that the FCC should permit satellite radio broadcasters to do more local programming.

And then I might ask Mr. Cooper to use up a half minute if we have got that kind of—oh, we don’t have that kind of time. Sorry, Mr. Cooper.

Mr. KARMAZIN. Okay. So, I will tell you that providing local content is not our business model. You know, I mean, unless you sit there and say that we are broadcasting the Washington Redskins and that is a local content, our belief is that every place you have a satellite radio—this is not television and this is not DirecTV-EchoStar.

Every place you have a satellite radio, you have an AM and an FM radio. So for us to duplicate what they do very well is not part of our plan. But if in fact—we want to get this deal done. There are so many synergies that are there. We have committed to taking a chunk of the synergies, a good chunk of the synergies, and pass-

ing it along to the consumer as a financial benefit. So, we want to get the deal done.

If, in order to get the deal done, we need to make concessions, we are prepared to make concessions and we will work with the FCC on doing it. Putting in more local programming, we think, would not be in the consumer's best interest, because they have free over-the-air radio in their market where they are doing it.

We don't sell local advertising. We are not in that business. We don't plan to be in it, we don't want to be in it, but if that was a condition, you know, we would certainly consider anything that the Government would ask us to do.

Mr. CONYERS. Thank you so much.

Steve Chabot, our Ranking Member, has the best excuse for being late that I have heard lately, because he was before the House Administration Committee getting his budget administered for the 110th Congress.

I am glad that you are here now. And I am sorry that they kept you so long. I wish you good luck before that Committee.

Mr. CHABOT. Thank you very much, Mr. Chairman. As you know, duty calls and you have to answer, and I did in that case.

I want to take this opportunity to apologize for being late, first of all, but also to thank the distinguished gentleman from Michigan, Mr. Conyers, and the distinguished gentleman from Texas, Mr. Smith, for their leadership on this issue.

And the topic that we are examining this afternoon demonstrates the Task Force's continued commitment to carrying out its responsibilities and the critical role it will play in assessing the viability of our antitrust laws, especially as they relate to competition in the 21st century.

The promoted XM-Sirius merger highlights just one of the complex issues that the Task Force will face: examining current business conditions in an age of constant change and advancing technology and the impact that these conditions have on consumers.

I will begin my questioning, and I will have to make it relatively brief as well, because we are all restricted by the 5-minute rule.

I will begin with you, Mr. Karmazin, as the Chairman did. Could you explain again why it is necessary for, you believe, the two companies to merge, and what benefits the consumers arguably would receive that they don't already have in the current market and what inefficiencies are the two companies experiencing that makes merging necessary? In about 2 minutes, if you can do that.

Mr. KARMAZIN. I will talk real fast, unlike my normal style.

First of all, it is not necessarily. We are not making a failing company argument and we are not saying that if in fact our merger were not approved at the end of the day we would not continue to go along and do business.

Why we think it should be approved is the fact that the consumer will get more choice, lower prices and the ability to have less confusion and more content. So we believe it should be approved because it is very pro-consumer.

It doesn't have to be approved. We can go back to sitting there having our existing businesses. But the idea is, if there is an interest in giving the consumer more choice and better pricing, it happens with the merger, not without the merger.

Mr. CHABOT. Okay. Thank you very much.

Mr. Rehr, if I could turn to you next, and I know that you have, in your written statement, adamantly opposed the merger of XM and Sirius because it creates a monopoly, arguably.

Would you elaborate a bit on your opposition to the merger and why you believe it would not be good for consumers?

Mr. REHR. Yes. Thank you, Congressman.

Let me make three quick points.

Number one, and I am not a lawyer, I am an economist by training. Monopolies in and of themselves are bad. And one of the points that I made in my oral testimony is that we are currently in a duopoly, a two-market—or a two-company market in, mobile national audio multi-channel satellite radio.

So when you go from two companies to one company, I think you have to say what is the overwhelming reason why we should create a monopoly? Because when monopolies are created, they have a tendency to do bad things—raise prices, restrict supply, engage in dictating terms of contracts—that wouldn't exist in a duopoly, two-company model let alone in a multi-company model. So we have real concerns about creating a monopoly.

Number two, with a monopoly, comes monopoly power and monopoly profits, profits that wouldn't be able to be grabbed by the companies if they were in a competitive market. And we believe those will be used for exclusivity, constraints put upon programmers, as well as cross-subsidization to compete against local radio stations.

Mr. CHABOT. Thank you very much.

Mr. Biggio, if I could turn to you next. Would you describe the antitrust scrutiny that the proposed merger would undergo?

Mr. BIGGIO. Yes. The merger is subject to Hart Scott Rodino, which means it has to be notified to both the FTC and the DOJ. The DOJ would review it, given its past history in this market.

The merger also is going to be reviewed by the Federal Communications Commission and during that process, the parties will have an opportunity to provide a very considerable amount of information, both pursuant to a subpoena from the Government as well as voluntarily, to explain what the consequences of the merger will be.

Both the FCC and the DOJ will do a thorough investigation not on the only of the parties but also of other affected firms, customers, competitors, content providers, automobile OEMs, I am sure, the electronic retailers and so forth, to figure out what choices the consumer actually has and at what price point would a consumer who is interested in satellite radio after the merger switch to some other product in order to avoid a higher price. That is the basic question.

Mr. CHABOT. Let me cut you off there, if I can, because I have less than a minute and I want to get to Mr. Cooper.

I apologize, Ms. Sohn, for not getting to you.

Mr. Cooper, one of your complaints about satellite radio as it currently exists is that the companies force consumers to purchase bundles of channels. If the combined company chose to offer tiered service or was forced to do so by the FCC, would that do anything to ameliorate your concerns? Could you comment on that issue?

Mr. COOPER. Each of the conditions that we have heard about ameliorates some concern.

Mr. Karmazin has proposed the regulatory regime that, if I came up here and offered it, members would fall back over in their chairs. I mean, he is talking about price, quantity regulation, public interest obligations, all kinds of regulatory oversight. He says don't trust me. Tell the regulators to impose it on me. So those take away the harms.

But in the long run—I have been testifying up here for 30 years. And the essential message that I have learned, and I believe it, is that competition is the consumer's best friend.

So, Mr. Karmazin has said, look, impose these regulations on me—and in the antitrust case they won't be permanent, so we will worry about what happens when they go away—and I will be good for a period of time. But consumers are, in fact, better serviced by competition.

And let me make a point. He has talked about—he sells the consumer short. He says consumers are confused by our two products. Consumers see hundreds and thousands of products in the market every day. They are differentiated but similar. They can handle that difference. If there is confusion, it has been created by their failure to deliver—notice the way he parsed these words. "We developed an interoperable radio, but we just can't deliver it."

Imagine the regulator now having to deal with that kind of double talk.

So from our point of view, you can name these conditions, but in the end it will be a wrestling match with that kind of parsing of words. It will be time limited and it will take away the consumer's best friend, which is competition.

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. CONYERS. Mr. Howard Berman?

Mr. BERMAN. Thank you, Mr. Chairman.

As I listened to Mr. Rehr's testimony, my mind wandered for a second, and when he was talking about merged entities that would control many radio channels and many local markets, I thought for a second he was talking about Clear Channel.

But, Mr. Karmazin, in announcing the merger, you talked about the field of competition, and in the course of it, you mentioned over-the-air AM-FM radio, and you also mentioned iPods, which is really more of a distribution mechanism than a performance mechanism.

And I was wondering, if—I had introduced last year the Perform Act, having reintroduced it this year, because of my concern that with new portable devices that turn performances into distributions, there was an issue here of whether or not the creators of the music are the essence of all of the business models being talked about here, whether they were getting fairly compensated.

And I do note that under your leadership, Sirius reached a marketplace deal through negotiations to compensate the artists and their record labels. XM took a different approach and preliminary litigation—actually, it was a judicial decision which talked about what they were doing and raising the question of whether that was really a performance and the meaning of that term under the copyright law.

Will your new company plan to adhere to the perspective that you adopted for Sirius of ensuring adequate compensation to copyright owners?

Mr. KARMAZIN. We believe that we made a business decision in paying a royalty. We thought it was the right thing for our company to do. XM had a different viewpoint and they took advantage of the courts, and I think that is an option.

And I think that either XM will win or lose in court, and that will find its way, or they will reach an agreement. I think that—

Mr. BERMAN. Well, at some point there will be a merger, if you have your way, and it is not then you and XM anymore.

Mr. KARMAZIN. And at this point, I have no idea if this litigation issue will be settled or resolved beforehand. I tend to like not to use the courts. I tend to also like to use the marketplace, so my point in response to the Chairman's question on how do I know about pricing and other issues. The marketplace—there is no monopoly or duopoly. That is the most bizarre thing I have ever heard. I can't wait—

Mr. BERMAN. I didn't use those terms.

Mr. KARMAZIN. I can't wait to get the market definition.

So I think that there is a sense that there are all of these products out there. Ninety-five percent of the products out there compete with iPod, not because we have a record function in it; just because if you are driving in your car and you put your iPod in a jack, you are listening to content. We have very few products out there with the record function in it so that the competition has nothing to do, when I mention it, with the Perform Act issue. It has to do with the fact that people are listening to their music on iPod or listening to their music on satellite radio.

Mr. BERMAN. Well, since I raised it, I guess I am not the person to make this point, but it is not a hearing on that, the device's ability to record hours of music, ability to give a play list and have people select and maintain copies is an issue.

But let me move on to another issue, just for the recognition that, since you have this marketplace view, you made this deal and you will be the CEO of the new company, you are raising the expectations of how that issue will finally get resolved.

Mr. Rehr, your testimony talks about wanting the level playing field. But the over-the-air radio station—and Ms. Sohn made this point, but it is worth repeating because it was so good. You operate a profitable business built on music, but you don't pay artists and record companies, whether it is in the analog or in the digital format.

So when every station in America at a certain time of the year is playing "White Christmas," you don't pay Bing Crosby or his heirs, you don't pay the people who own that song. When Frank Sinatra is singing "New York, New York," you are not paying his heirs or the people who own that song.

The competition that you talk about, that you are concerned about, has to pay the performance right to the recording artist for the labels for that music. Why is this present situation a level playing field? Why shouldn't we rectify something that was done originally in a different time in a very different situation?

Mr. REHR. I think that is a great question, Mr. Berman. I would respond to it in three ways.

Number one, radio broadcasters and artists have a long symbiotic relationship that benefits artists. We build demand for them in the market. I think a lot of artists recognize that.

Number two—

Mr. BERMAN. Well, then, why are—and, so, what? These poor guys are suckers because—

Mr. REHR. No, no, no. I mean, I think—hopefully you, I believe, as the Subcommittee Chairman will be having hearings on the Performance Act and we would be more than anxious to testify on our viewpoint, because it is a very complicated issue.

But in a nutshell, I don't think it is so much of the artists. I think they are looking at their revenue—I think the recording labels have seen their fundamental business model changed and are looking for ways to not only compensate the artists, but to frankly compensate themselves.

And the three things that I can say about broadcasters are, number one—

Mr. BERMAN. I don't think that is an issue much in dispute.

Mr. REHR. Right. We build demand for the artist—

Mr. BERMAN. And you are looking to avoid compensating both.

Mr. REHR. No, I don't think so, because I think we compensate them—

Mr. BERMAN. Wait. But you are sitting here—Webcasters are paying it.

Mr. REHR. Right.

Mr. BERMAN. Satellite radio guys are paying it. Apple is paying it. All kinds of new services that perform and deliver music are paying it. Over-the-air radio isn't paying the performance right.

Mr. CONYERS. The gentleman's time has expired, regretfully.

The gentleman from Florida, Mr. Keller.

Mr. KELLER. Well, thank you, Mr. Chairman.

The issue before us is controversial and simple. By allowing this merger, is the Federal Government encouraging competition, choices and low prices or are we creating a monopoly and bailing out two struggling competitors who may have overspent on high-priced talent.

I remain completely open-minded on this issue, and I am trying to look at this issue through the eyes of a typical consumer. So I want to ask some pointed questions.

I am going to ask the first to you, Mr. Karmazin, and to be fair about it, just realize I am going to ask Mr. Rehr some equally tough questions.

But as I look at this through the eyes of a consumer, and I am one—you will be pleased to know I am a Sirius subscriber, and my favorite preset, for example, is a stand-up comedy channel.

Now, if you decided to jack up your rates today, I would have the option of going to XM. Now, after the merger, I have got no place to go. If you decided to increase the price from 12.95 to \$14 as part of Sirius-XM, would I pay for it? Probably, yes. I think it is probably worth it and I have got nowhere else to go. There is no competitor with the traditional AM-FM because the material on that particular channel is a little too edgy and adult-oriented.

On the other hand, it is better to have one choice than no choice if you both go under. So I am sensitive to that, too.

So let me ask you, am I correct from your testimony today that as a condition to securing approval from the Federal Government for this merger that you would agree to pricing restrictions for a period of time?

Mr. KARMAZIN. Yes.

Mr. KELLER. And how long a period of time?

Mr. KARMAZIN. We are willing to talk to people about it. But I will tell you, the main reason, Congressman—

Mr. KELLER. Four years?

Mr. KARMAZIN. Congressman, the main reason about the pricing is not the regulated issue. It is we compete with free. And I can give you alternatives—

Mr. KELLER. I understand that and I am going to follow up on that.

Mr. KARMAZIN [continuing]. And that is the pricing point.

Mr. KELLER. But when you say you are agreeing for a period of time, it is an impressive statement. I think you will make news with it. But if you are agreeing to pricing restrictions for 2 weeks, it is not impressive. For 4 years, it is impressive.

Mr. KARMAZIN. Okay. So why don't we now understand in your judgment what that window is and let us see if we can come to an agreement somewhere in that window between 2 weeks and 4 years?

Mr. KELLER. But you don't have any—when you told us, and you testified that you were going to agree to it for a period of time, you had no idea in your mind whether it was 2 weeks or 4 years?

Mr. KARMAZIN. Congressman, the reason that we believe that is because we believe that we need to show you and others that this is in the public interest. And we know that price is important. So we know we want to get there. We want to get there in whatever the regulators and we feel is the appropriate time frame.

Mr. KELLER. Okay. And did I hear you correctly when I said you would agree, if necessary, to formally enter into an agreement with the Federal Government that you would not be competing with the local broadcasters with respect to local news, traffic and weather, if that was necessary to get the approval?

Mr. KARMAZIN. Well, I think we would be open—I think we would be open to lots of things. I think that we are trying to make this agreement, this merger, happen for the benefit of the consumer.

The idea of the Government saying it is not in the consumer's best interest to give them more choices sounds anti-consumer. But if the idea of the merger is conditioned on certain restrictions, we would be open to those restrictions.

Mr. KELLER. Okay. Now, as a Sirius subscriber, am I correct from your testimony that I am not going to have to junk my old radio as part of this new XM-Sirius merger and get a new radio?

Mr. KARMAZIN. Guaranteed.

Mr. KELLER. Okay.

Mr. Rehr, let me turn to you. Must be pretty good news for you, hearing, at least, that Mr. Karmazin says he has no intention in their business model to engage in competition with the AM-FM

radio stations with respect to local news, traffic and weather. Why aren't you smiling on hearing that?

Mr. REHR. People who want to attain a Government-sanctioned monopoly, with all due respect, will about say and do anything to grab it.

Mr. KELLER. And I promised him I would give you some hard questions, too. So let me just ask you what Ms. Sohn said and I will give you a chance to respond.

Mr. REHR. Let me—

Mr. KELLER. You are going to have as much time as you want to respond, but I have got to get my question out or I get zapped here.

Ms. Sohn said it is pretty hypocritical of you to come up here and talk about the beauty of competition when you all vehemently oppose having the satellite radio folks compete with the traditional AM and FM with respect to local news, weather and traffic.

What say you to that argument?

Mr. REHR. Let me first respond to the previous question, and then get to the latter question.

Mr. KELLER. You bet.

Mr. REHR. The previous question is, how can you tell if someone who is attempting to go from a duopoly to a monopoly will keep their commitments into the future. The only way I can judge that is based upon their past performance. It is questionable at best, at best.

It would be one thing if the companies came before you and said, we fully complied with the FCC regulations to the letter, and we will do that into the future. It is another thing to recognize, in fact, that at least in three areas they have flaunted the rules, ignored them, and in fact, to Mr. Karmazin's point, one of the repeaters that he talked about, where he said, you know what, it was in the wrong place, it was 67 miles away from the place they reported it to be. And it does cause interference problems. It caused interference problems with the wireless people. I would suggest that you bring them in as well to find out about what this monopoly will do to their business.

To the point about competition and local advertising in local markets, you know, we need to go back to 1997 when the FCC made the determination of dividing the spectrum into the 25 megahertz that were awarded to national multi-channel audio companies. And I think the determination was made that it wanted to be sure that it could promote technology, but it would not undermine localism and local radio, which has been the backbone of this country since Marconi invented the devices.

Mr. KELLER. The Chairman has said I can give Ms. Sohn a chance to reply to that.

Ms. SOHN. I think part of the problem I am having with this whole discussion is sort of the silo approach. Okay. We are only talking about satellite radio. Why are we not talking about all radio?

And that is my problem with Mr. Rehr, is that, you know, 50 years ago—excuse me, 75 years ago, you know, Congress said that broadcasters should have a monopoly on local programming, and therefore in 2007 we should keep it that way.

It seems to me to be ridiculous. In this day and age, radio is radio. Music is music. I understand that Mr. Karmazin will say just about anything to get his merger, but I am surprised that he doesn't want to do local radio. Why not?

And, I mean, you talk about level playing field, the Government bailout. You guys are asking for a Government-sanctioned monopoly on local programming and local news. And that just, in this day and age, makes absolutely no sense at all.

Mr. CONYERS. Thank you.

I am sorry, Mr. Cooper, but I will recognize Mr. Rick Boucher.

Mr. BOUCHER. Mr. Chairman, thank you very much. Let me commend you at the outset for forming this Antitrust Task Force. I think that is a very useful step for this Committee to take.

And I also want to commend you for making the Sirius-XM proposed merger the first subject to which you have drawn this Task Force's attention.

Mr. Karmazin, it seems to me that much of the decision regarding this merger will really revolve around how the relevant market is drawn. And so let us take just a few minutes to talk about what that relevant market actually is.

It seems to me that a very powerful argument has been made. You have made it here today. I think perhaps Mr. Rehr's very presence here helps to confirm this argument, that the relevant market really is all of radio.

You are offering satellite radio, but you have terrestrial radio, Internet-based radio. Then you have the whole IP-enabled set of applications, including music downloads and streaming, streaming and downloads to portable devices like iPods.

And as Ms. Sohn just said, music is music and it really doesn't matter that much, the source of it. All of the music sources are, in fact, in competition, one with the other.

There is a very interesting survey that Arbitron released this week and I would like to get your reaction to this. It shows that the satellite radio listening is only about 3.4 percent of all radio listening. So if you measure all radio and look at that entire audience, satellite radio is actually a fairly small player in that.

It also makes the point that satellite radio listeners are avid listeners to terrestrial radio. They actually spend more time listening to terrestrial radio than they spend listening to satellite radio. Fourteen hours weekly for terrestrial, 10 hours 45 minutes weekly for satellite. And then they also listen to Internet radio. That is an average of 8 hours 15 minutes weekly.

So when you add Internet-delivered radio together with terrestrial radio, the radio listener, the typical one who also subscribes either to XM or Sirius, is listening to terrestrial and Internet radio more than twice as much time as he is listening to XM and Sirius.

I think these are very interesting statistics. I think they clearly show that this is a unified market for music delivery.

I would like to get any comment you want to make on that. But before I turn that over to you, let me just ask one other question, and then you can have the balance of the time to respond.

Ms. Sohn has made some proposals for conditions. And I am confident that you noted those. If not, I am sure she would be happy to repeat them. And I wonder what your reaction is to the proposal

that she has made for conditions. They appear to me to be reasonable. And I would think that if those conditions are accepted, and if you come to an appropriate promise with regard to freezing your prices, that this merger is very much in the public interest and in my view it should be approved.

So if you would like to comment.

Mr. KARMAZIN. Thank you.

So, firstly, how do I feel about the fact that we only have 3.4 percent of the radio listening? I feel quite bad about that. I would like it to be higher. So I am not happy about that. But it does clearly reflect that anybody who believes that a market definition of audio entertainment is a market that is called something that was talked about before that I can't even remember, but that was just saying that there is a duopoly. I don't believe there is a duopoly.

So if I don't believe there is a duopoly, I certainly don't agree there is going to be a monopoly. We compete with all of these services. Again, regarding—I was prepared for this by telling—you know, my people told me not to go across tables, not to get angry, you know, keep my hands folded and be nice.

But I certainly don't like this idea of the premise behind saying anything to get a merger approved, because you know what? At the end of the day the regulators are going to either approve it or not approve it and we are going to go on, okay. We are not making a failed argument. We are not saying we overpaid for content. As a matter of fact, we don't believe we overpaid. We paid for it at the market rate and we will continue to pay for it at the market rate.

So would we consider certain conditions? The answer is yes. We currently are providing public service programming. We currently are providing noncommercial. We provide NPR, two channels of NPR. So the idea of pricing—and just so you understand, and I will be quick on this—the reason we are not going to raise prices is because terrestrial radio and all these other choices have hundreds of millions of people. We have a total of 10.

The way you get more isn't by saying, I am not going to subscribe because it is 12.95, but I am going to subscribe because it is 14.95. The hope would be, based on the efficiency of this merger, we can lower the price, have a cheaper offering, and therefore get more subscribers and therefore get more than 3.4 percent of the audience.

Mr. BOUCHER. Thank you, Mr. Karmazin.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much.

We turn now to Lamar Smith of Texas.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Karmazin, yesterday I checked Sirius's Web site. And it seemed to me that much of the comparison shopping, in fact all the comparisons, were with brand "X," which I assume is XM. Is that right?

Mr. KARMAZIN. I can't speak for exactly what the Web site is, but sounds like it would be, sir.

Mr. SMITH. Given the comparisons, I think all the comparisons were with the equivalent brand "X," was the equivalent of XM. The appearance, therefore, is that you are not worried about other com-

petition other than XM. And let me give you an example of why I think that may be the case.

If I am driving to work in Washington, D.C., and I want to listen to listen to Sixties hits—and by the way, there is no more oldies station in D.C., much to my regret. But if I wanted to listen to Sixties hits and to BBC News and to an NBA game, where else do I go besides satellite radio for that? In other words, where is the competition?

Mr. KARMAZIN. So, I think that clearly the fact that satellite radio is serving the consumer in Washington because there is no radio station that is playing Sixties hits is sort of another reason that we are competing with them, because you are, I guess, saying that maybe if in fact there was a free station that played Sixties hits, that you might not be going to satellite radio.

There is no new music that is being made by the Sixties artists. These are artists that have made that music. There are plenty of devices that enable you to get that music there. There is tremendous competition. We want you, that if you are going to go buy satellite radio, we are going to want you to buy Sirius, and Gary Parsons at XM is going to want you to buy XM.

So there are a bunch of things that we do to talk to the consumer who is going to buy one.

Mr. SMITH. I understand. I am not sure I entirely understand the fact that I can't get the Sixties or the oldies music means there is more competition. But I appreciate your answer and I thank you for that.

Mr. Biggio, let me go to you. You are an antitrust expert and, hopefully, you are a little unbiased here.

Let me make a presumption. Suppose that emerging technologies are not yet right. Suppose emerging technologies do not yet provide a significant amount of competition with satellite radio. But suppose that sometime in the future and in some coming year there will be significant competition from the emerging technologies. What is allowed under antitrust law to anticipate in that kind of situation?

Mr. BIGGIO. Well, let me answer that question from both sides.

I think part of the argument Mr. Karmazin is making is that satellite radio is in fact an emerging technology and right now it doesn't have sufficient penetration to maximize and optimize its profitability. And so it makes no sense for the companies to raise price after this merger if it means they are going to maintain their current subscription levels.

To the extent they can keep their prices low and expand their output that way, and that is an argument why the merger, in fact, is not anti-competitive.

The same argument applies to the products you are talking about. If iPods and other products are coming on the market today but have not yet reached a sufficient market presence to actually be a competitive threat, then they should not be included in the market until such time as they do have a competitive constraint on the market.

And that is really a question of time development and usually under the merger guidelines, we are talking about a 2-year period¹

of concern that these other potential entrants aren't sufficient constraints within 2 years, then they are typically discounted.

Mr. SMITH. Okay, good, thank you.

Mr. Rehr, a final question for you. In your testimony, you distinguish between local markets in which there is arguably more competition and national markets in which there might not be as much competition. Why is that significant?

Mr. REHR. I think it is significant because when the FCC created the duopoly in 1997, they saw a nationwide multi-channel audio content service. The same channel that you get in Bangor, Maine, you get in San Antonio, Texas, you get in San Francisco, California.

Nationwide services like Sirius and XM compete with every local broadcaster in this country. But does a small station in San Antonio, Texas—

Mr. SMITH. Any reason you are picking San Antonio?

Mr. REHR. It is a coincidence. A small station in San Antonio, Texas, or Milwaukee or in Orlando, doesn't compete on a national level with those nationwide audio multi-channel programs.

Mr. SMITH. Thank you, Mr. Rehr.

And thank you, Mr. Chairman. I will yield back.

Mr. CONYERS. Thank you very much.

The gentlelady from California, Ms. Zoe Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

And congratulations to you and the Ranking Member for establishing this Task Force. I think it is going to prove to be very useful to the Committee and to the country to have this renewed—not just today on this particular issue, but on the whole issue of competitiveness and antitrust overall. And I really feel that in the last several years we have not had sufficient attention paid to this very important subject. And I just think this is a first step that is just really very good. And I appreciate your leadership in doing this.

Mr. Boucher asked most of the questions I was going to ask, but I do have, for Ms. Sohn, you made some recommendations. I was at the House Administration Committee, actually, suggesting that the Ranking Member get more money for his Subcommittee. But I did have a chance to read your testimony.

I am wondering how the conditions that you have recommended for this merger compare to the obligations that currently exist in the broadcast arena.

Ms. SOHN. Well, they are different. I mean, if I am going to be completely cynical, I am not sure that the broadcasters have any obligations any more except maybe to make time available for Federal candidates.

So these are actually more akin to what DBS—well, some are anyway. I mean, the first is that the company should provide choice in pricing, so a la carte and tier pricing.

Ms. LOFGREN. Obviously that is not applicable.

Ms. SOHN. Right. But DBS has an obligation to make between 4 and 7 percent of its capacity available for a noncommercial educational-informational programming. And this is programming over which they have no editorial control. I didn't mention that in my oral testimony but I think that is really, really important.

Ms. LOFGREN. It is in your written report.

Ms. SOHN. Yes. That the satellite provider should not—number one, it should not be able to say, well, we already have NPR on two channels. First of all, it has got to be new programmers. I would think this would be a great place for some of the low-power FM stations that got shut out by the broadcasters several years ago.

So they would have no editorial control. Also, you couldn't have more than one channel taken up by any particular programmer.

So it is more akin to DBS than it is to over-the-air broadcasters.

Ms. LOFGREN. Now, your comment about—and I saw people grimacing when you said that there weren't any obligations on broadcast.

But to the extent that things are not as tight perhaps as they once were in the broadcast area, do you think if there were a condition on the merger relative to noncommercial educational-informational programming without control of editorial content on the satellite side, that that ought to be reinvigorated on the broadcast side?

Ms. SOHN. Well, boy, I have so many scars from this. Yes. If we are talking about level playing field, probably yes.

Ms. LOFGREN. In furtherance of that, the testimony has been that there are so many providers of audio experiences, all the way from iPods to—are we thinking that we should impose conditions like this, for example, on Internet radio?

Ms. SOHN. Absolutely not. I mean, they are not asking to merge. That is abundant.

Ms. LOFGREN. So it is just because there is enough competition and a low barrier to entry that we wouldn't want to provide that kind of—

Ms. SOHN. Yes. I mean, I don't want to give the impression that I foursquare think that this is going to pass antitrust muster. I was very relieved to see Mr. Biggio also hedging his bets, because he is an antitrust expert and I am not.

So, you know, I think the key is whether these other technologies that I mention in my testimony are substitutable and whether they would constrain prices. I don't know the answer to that. Mr. Biggio doesn't know the answer to that. That is obviously the case—

Ms. LOFGREN. I am sure nobody on the Committee knows the answer to that.

Ms. SOHN. That is the case that Mr. Karmazin and Mr. Parsons are going to have to make to the antitrust authorities.

Ms. LOFGREN. I will yield back, Mr. Chairman, the time. Again, I appreciate your leadership in establishing this new Task Force and I appreciate being a Member.

Mr. CONYERS. I thank the gentlelady.

We now turn to the distinguished former Chairman of this Committee for so many years, Mr. James Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Let me start out my questions with two premises. First, in 1997 when the FCC licensed spectrum for satellite radio, they placed a condition on their license that there had to be more than one provider or more than one licensee. So at that time my belief is that the FCC made a policy decision that other mediums of transmission were not necessarily the exclusive competition, but that

there had to be competition between more than one licensee for satellite radio.

Then 4 years later, the two largest satellite TV broadcasters, EchoStar and DirecTV, proposed a merger. We had a hearing in this Committee where the CEOs of both of those firms came to testify. There was concern that was expressed at that point in the Committee that this was monopolistic in nature. And that merger was rejected.

Now, given the fact the FCC stated the ground rules that you need to have two or more satellite radio providers and that they rejected a merger of the two biggest satellite TV providers into one, what is different here?

Mr. Karmazin?

Mr. KARMAZIN. A whole lot.

So, first of all, we obviously are going to need to make the argument to the FCC that what was talked about 12 years ago, which found its way into a statement 10 years ago, is just not relevant today in the competitive marketplace. So we have to make that argument and we will see if we prevail.

Mr. SENSENBRENNER. But there was competition then, too, at least with terrestrial radio, and the FCC didn't look at that. They said you had to have two satellite broadcasters.

Mr. KARMAZIN. And, sir, that was because there was no Internet radio then. There was no HD radio then. There was no iPod then. There were so many more things that came along in addition to terrestrial radio—

Mr. SENSENBRENNER. My wife, she subscribed to XM. That apparatus is in her car, so she listens to XM in her car. Now, I would be pretty worried if she was playing on the Internet or playing on her iPod while trying to access this type of entertainment in the car. Real worried about that.

Mr. KARMAZIN. But let me tell you, there are receivers that are—and we saw them at the Consumer Electronics Show and they exist today, not hypothetical—that are radios that enable you to get the Internet just like you have a satellite radio that enables you to get the satellite.

But, again, I understand your point. It is there. We understand that it is an issue that we need to deal with the FCC.

But let me talk about the EchoStar-Direct one, because that one is just totally on the opposite side.

If you take your consumers in your area, I would say close to 100 percent of those people get their television from either a cable or satellite provider. They are not getting it with rabbit ears and they are not getting it over the air. So the idea of what the market looked like in the EchoStar—and I am not an antitrust lawyer. But in the idea of EchoStar and DirecTV was you had a cable company you paid for. You had EchoStar you paid for. And you had DirecTV you paid for. So it was three people going down.

In this case, the vast majority—the vast majority—over 90 percent of the people flip the other way. They get it from free over the air radio, in every single home, in every single car. So you have free over-the-air radio there. So this one is not like cable or satellite.

Mr. SENENBRENNER. I have only got a minute left, so reclaiming my time, utilities have been regulated monopolies. There have been State utility regulations commissions in all 50 States. And that model ended up being determined not to be good public policy in practically every State in the union where there was utility deregulation. Some have had disastrous consequences, like California, and in other States it has worked out fairly well.

What you appear to be advocating is to make your merged company somewhat akin to an old regulated gas company, and I don't see where the consumer ends up benefiting in that because the regulated utilities of old ended up being guaranteed a rate of return on their investment. And I don't think that is the kind of model that we policy makers want to sign off on because we have already rejected that in other areas where regulated utilities have been.

Mr. KARMAZIN. And what you said we are looking at is so far from the truth at all. We are not saying we are going to be a monopoly. We are not saying we are a monopoly.

Mr. SENENBRENNER. But you are a monopoly.

Mr. KARMAZIN. We are absolutely—

Mr. SENENBRENNER. You are going to be a monopoly.

Mr. KARMAZIN. We are absolutely not a monopoly. I mean, the idea is, if you are saying you believe that the radio is—

Mr. SENENBRENNER. Just one provider of the service is a monopoly.

Mr. CONYERS. The gentleman's time has expired.

Let me turn now to the gentlelady from Texas, Ms. Sheila Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, let me thank you very much for what I think is an enormously wise decision to really shine the light on a series of mergers.

And in order to be fair to Mr. Karmazin, to not call it monopoly, but I might just say that the word has been used. And I think we have to be frank with each other.

It seems unique, but I would be part of the political constituency or elected officials that really wants more opportunities in the media for people to have sources of information. I frankly think merged newspapers, single-town, single-newspaper cities—certainly we know that newspapers are competing against Web sites and otherwise. But still, I think we lose. I think the first amendment loses.

So I raise that concern, and I thank the Chairman for his enlightenment on allowing us to have this opportunity for transparency.

Might I also indicate very quickly that I think the Chairman has asked a very vital question: What is a critical market? And I raise these points because as I ask questions, one of the witnesses, I think, made the point that this seems to be too soon after the initial licensing that has occurred. And therefore it doesn't give time for there to seem to be some settling.

The Texas broadcasters are walking around, and Mr. Rehr may have created that presence. I saw one walking in the hallway. They were political enough and astute enough to just give me a warm greeting.

So I want to know that XM and Sirius are not biased. They didn't bother to try to create a bias in my mind.

But let me try to pose these questions, particularly to you, Mr. Karmazin, and I have given you the backdrop of my concern.

To Mr. Biggio, I think you sound like the baseball player in Houston, so maybe you are related to him. But I frankly don't think I want to leave the professionals only to this task, the FCC lawyers and Department of Justice lawyers. I have disagreed with them before. And their regulatory framework may not be what I think gives good overview of what may possibly happen.

And my bottom line is that you extinguish, you eliminate, you cease and desist for the wide vastness of information. I think that is key.

I am going to give you an opportunity to respond to that and the transparency question, meaning that we should have as much airing and hearings on this as possible. Then I am going to get to the meat of my concerns, and that is that all of these mergers, and in fact, all of these existing media entities—and if we were to go into the NFL, baseball and others, if we were to go into as my good friend from Wisconsin talked about, utility companies, et cetera, it is a closing down of opportunity. And one of the contingent groups that you close down the opportunity to—and I don't think Sirius and XM have been any shining star—it is diversity.

You are not diverse, I believe, as you exist today. And the question is what opportunities would be available once your merger occurred for a minority ownership. My view is that the participation would be reduced because you become a single entity. And together, now, you have shown no interest in that.

I have a little station that is FM low-power that is struggling in the community. The question would be whether there would be some vehicle to allow those stations to have content, to sell content, you sell it back and whether it would be, if you will, economical, or at least reasonable, that the little base of listeners that they have could even pay.

So let me yield to you and have you pointedly tell me about how what you are planning on doing doesn't dumb down diversity. African-Americans, Hispanics, Asians, women and others, as opposed to up lift. And what is your record today, which I don't perceive that you have a record that is strong enough to convince me.

Mr. KARMAZIN. Well, Congresswoman, firstly, I understand that there is a general tone that no mergers are good mergers. There is no such thing as a good merger. And probably consolidation in the media world has been so poor to date that no merger is good.

So if, in fact, the regulators and Congress does not allow our deal to go through, that is the choice. So the consumer will then go from not having any price competition that we are offering, not having any price advantage and also not having the choice, and not being able to get baseball and the other service. So that is a possibility—

Ms. JACKSON LEE. Did you hear me on the minority question?

Mr. KARMAZIN. I did. But you also mentioned at the beginning the idea of the merger and the idea.

On the idea of the minority, I think my track record is extraordinary on diversity in my whole career, and I think that I can—if you are interested—

Ms. JACKSON LEE. I am.

Mr. KARMAZIN. I can provide you with a whole lot of information, including being the person who started when Chairman Kennard was at the FCC, this whole minority investment, and I was personally a large contributor and also my companies have been large contributors.

Ms. JACKSON LEE. But you be inclined to do more?

Mr. KARMAZIN. I believe there is always room for more. I believe that our service is not doing as good a job as we could. But I can't tell you who is doing as good a job as we could.

I can tell you that we have a number of channels that are, you know, catering to the Hispanic market, to the gay lifestyle market, to the African-American market. I think that if in fact we didn't have to keep duplicating each other's services for competition reasons, that we can have more choice available for more niche programming and more opportunities.

So I don't want to make any promise because I will only be called "you will do anything to get the deal approved." So you are damned if you do, damned if you don't. If I say I want to do things, it is because of the merge. If I don't say I am going to do it, it is because I am not cooperating.

Ms. JACKSON LEE. But you are in the light of day. So you are saying it publicly, so that is good.

Mr. CONYERS. The gentlelady's time is expired.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. CONYERS. And we turn now to the distinguished gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Mr. Chairman, thank you very much.

I would like to ask all of you to start out, tell me, is it a coincidence that XM and Sirius charge the same rate for their services now?

Mr. Karmazin?

Mr. KARMAZIN. Well, we started our service 5 years ago and the price was \$12.95 then and we have not raised our price.

XM started its service at \$9.95 and chose to raise the price because of the cost of content. I could tell you that the reason that they are both at \$12.95 and not at \$14.95 or \$15.95 or \$16.95 is that we are competing with free.

It is hard to get subscribers when you are charging \$12.95. It is harder to get subscribers when you are charging \$14.95. So the idea of having higher prices the way it is now doesn't work because what we are competing with is not each other. If we had every one of their subscribers, okay—again, not poverty, just facts. We have lost \$3.8 billion so far. Okay. So far. That is our business plan. That is the way it works.

The idea of us raising prices without any cost—the cost savings is going to limit our ability to get subscribers. I mean, it is just real math.

Why would people not be subscribing in enough numbers at \$12.95, but they would at \$14.95?

So there are synergies in this deal. There are 300 million or so that analysts have said that you could save each year. What we are saying is if there are synergies in the deal, we can take a chunk of the synergies and provide it to the consumer if the merger is approved. If it is not, the companies will continue to be able to price—there is no discussion on our parts. I mean, they don't call me, we are not allowed to talk to each other. All right.

So the fact is that the prices could go up after the merger, it may not go up after the merger. I could tell you if the merger is approved, they won't go up.

Mr. GOODLATTE. Mr. Rehr?

Mr. REHR. I think that, first off, it is coincidental that it is the same price and whether it is price mechanisms in the market determining that price or not, I don't know.

But I think there needs to be a distinction between this argument being made that we are competing against free and therefore we can't raise prices. If in fact it is a duopoly that has a distinct market of people who are willing to spend money to buy a nationwide multi-channel audio programming, it is the price elasticity that those people will face that will determine whether that price goes up or down.

Am I willing to pay 50 cents more when there is a monopoly? Perhaps. Maybe a dollar? I mean, you can't raise the price to \$100 a month and get people to sign up.

Mr. GOODLATTE. But presumably both of these companies would be charging more right now if they could get more.

Mr. REHR. Well, I think that is also a value proposition, quite frankly. I think that they would—

Mr. GOODLATTE. Mr. Cooper?

Mr. COOPER. Well, you know, the interesting thing is we have sat here for 2 hours and no one has suggested these companies might have lowered their prices to increase subscriber ship.

He has talked about, well, it is \$12.95. We could go to \$15. Why not \$6.95 and quadruple your subscriber ship? If you do the math, he would have a lot bigger cash flow.

These are companies that pick very high prices and very big bundles and said we are going to do the cable model, thank you, and that is the way we are going to make our money.

In the Internet space, it is called promotion pricing. People price low to get subscribership and spread those costs. This is a management decision. In competitive markets, prices tend to be uniform. In duopoly or monopoly markets they tend to be uniformly high.

And now we said after 10 years, well, if you let us merge to a monopoly, now we will lower our prices. They have never competed on price. They have never seen the benefit of cutting their price in half to quadruple their subscribership.

Mr. GOODLATTE. Well, maybe they have or maybe they haven't competed on price—

Mr. COOPER. Well, they haven't shown it in the marketplace.

Mr. GOODLATTE. Well, I am not sure I disagree with you, Mr. Cooper, but let me ask Mr. Karmazin.

You have described all these other things that you compete with. But quite frankly, in that respect, you compete with almost anything. The only entity that you compete with right now on the wide

array of radio services that you offer is XM Satellite Radio. I am an XM subscriber. I am sorry to say I like baseball better than football or maybe I like Oprah better than Howard Stern. I don't know.

But in any event, I have had those choices and I have made that choice. And it is a great service. I also listen to my local radio stations. I also listen to my iPod. I would bet that the overwhelming majority of your subscribers are listening in their cars. So that limits the universe of what you can actually listen to.

But nobody else other than your two satellite companies offer the wide array of things like those that were describe by Mr. Keller and by others here, that you just cannot find on iPod or on your local broadcast radio station.

So why, when we eliminate one of the two competitors here, aren't we going to see a spike up? Yes, there is a limit to how much you can raise your prices, but I believe prices are going up if you are the only one in town.

Mr. KARMAZIN. Well, I have assured you and we have discussed that before, that we are prepared to commit that they won't.

So, I mean, you can sit there and say they are, and we are saying that they are not. And we are willing to commit to it.

But let me tell you, there is nothing that we are doing, you know, insofar as music choices. There is Major League Baseball that is available on your over-the-air radio station.

Mr. GOODLATTE. Not the Boston Red Sox where I live.

Mr. KARMAZIN. So, therefore, the idea that you could pick up the Boston Red Sox and the New England Patriots on the same radio has to be something if you were to say no to this deal that you are hurting the consumer.

And right now if you want to get the New England Patriots and you want to get the Boston Red Sox, you pay \$25.90. Okay? And that may be the way you want it to be.

Mr. CONYERS. The gentleman's time has expired.

I am pleased now to recognize the gentlelady from California, Maxine Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

I would also like to thank our witnesses who are here today.

I come to this hearing not necessarily opposed to your merger, but wondering what does it really mean in terms of participation in ownership by minorities.

First, let me understand, who owns, for example, Sirius Satellite Radio.

Mr. KARMAZIN. Both Sirius and XM——

Ms. WATERS. Sirius, I am sorry.

Mr. KARMAZIN. No problem.

Sirius and XM are publicly owned companies. None of them have a controlling shareholder. Both companies are listed on NASDAQ. And in the case of Sirius, we have, you know, a billion, 700 million shares outstanding. In the case of XM, they have 330 million shares. A lot of the institutions, the traditional owners of stocks, own the companies.

Ms. WATERS. Well, as you know, African-Americans and people of color have an awful difficult time accessing the media. You don't see us on the Sunday talk shows, on corporate television, and we

depend a lot on radio. And we particularly depend on African-American-owned radio. Whether it is Ms. Hughes's station, Radio One, or Stevie Wonder out in California, we know that they have the kind of programming that we can get on, we can talk to our constituents, and we depend so much on it.

My only interest is whether or not we are advantaged or disadvantaged by this merger.

Mr. KARMAZIN. I agree with you. I think that the broadcasters that you mentioned, particularly Radio One, has done an extraordinary job and I have been in the radio business an awful long time. And they have consistently—Cathy Hughes has consistently done a terrific job.

The thing that I can say to you is that we currently—and don't get me—if I get the number exactly wrong—I think each of our services have five or six channels that are specifically devoted to the African-American market.

And by the way, those services are available in every market in the United States, rural markets, urban markets.

So the benefit of satellite radio and having a healthier satellite radio, in my opinion, is that there is a platform that gets you not just into the markets where there is a large African-American population and somebody could have a station there, but it gets you into markets where you couldn't support an African-American radio station and there is none now.

So the fact that we are providing that, I think, is a service to the community.

Ms. WATERS. Could you describe that kind of programming so that I could try and identify with it now and know what exists now?

Mr. KARMAZIN. I am not the expert on programming. We can off-line get you information. But we have talk and public affairs programming dealing with it as well as entertainment.

We just—and again, I know I am going to get into trouble by saying this, but we had a conversation with Jamie Foxx about doing a channel for us, which he is going to do, called The Foxx Hole. And the purpose of that channel was to provide urban comedy, you know, on a national basis. And he has agreed to do it and we will start that channel in April.

So there is a spectrum ranging from music, ranging from talk, ranging from other types of content. But we can get you the specifics if you would like to.

Ms. WATERS. You have talk radio and you have news also that is targeted to these communities?

Mr. KARMAZIN. I can't say that we have news, because what we do is we pick up the traditional services. So the news that we currently have, you know, are the Fox News and CNN News and Headline News and MSNBC is on there. So there is no relationship.

XM has had a relationship with BET. XM has a relationship with Radio One today, that Radio One, Alfred Liggins that Cathy Hughes are programming a number of channels that exist on that service.

There are some things that we have had conversations with them about, not related, you know, to this conversation, but about doing more programming along those lines.

Ms. WATERS. Okay. Thank you very much.

Mr. Chairman, I will yield back the balance of my time.

Oh, just one moment, if I have some more time. I just got some information.

Now, as I understand it, Mr. Karmazin, you were the CEO of Viacom. You purchased BET. Is that right?

Mr. KARMAZIN. Mr. Johnson will tell you that I felt that the name of the team should be the "Mel Cat," not the Bobcats, with the money that he got from the merger.

So yes, I did buy—

Ms. WATERS. But I guess the question is this. This is serious stuff. That after you purchased it, the first thing that you did was to eliminate the news and public affairs programming on BET.

Mr. KARMAZIN. That is blatantly not true, and Bob Johnson and Deborah Lee will tell you that Mel Karmazin nor Sumner Redstone, who is at Viacom, had anything to do with it.

As a matter of fact, we encouraged them to expand, and you can find out that we absolutely did—they made a programming decision on a personality that got a lot of attention. But Bob Johnson would never, ever have us interfere.

One of the conditions of our buying BET was that he stay in Washington, D.C., because he was committed to the district, that the operation not be merged into Viacom, that he be the CEO reporting into directly to me so there was nothing else.

Now Deborah Lee has that same position in the company.

So no, I have not eliminated news. As a matter of fact, my history has been that I have expanded news.

Ms. WATERS. But you know that there are—

Mr. CONYERS. You are finished, Ms. Waters.

Ms. WATERS. Thank you. Thank you.

Mr. CONYERS. Thank you so much.

Mr. Cannon from Utah?

Mr. CANNON. I thank you gentleman.

We had the biggest copper mine in North America, the CEO was in the other room and I had to meet with him for a minute. And copper is good these days, I might point out.

Let me ask Ms. Sohn one question, just following up on your testimony.

Can you give a little more detailed about what you would like to do with the a la carte option? You know, you have just under 300 channels. At \$15, we are talking, like, 5 cents a channel if you did it that way.

In your testimony you talked about categories of channels. How would we ever create the guidelines or conditions that would work on that?

And then, Mr. Karmazin, if you would follow up, is it possible with your current equipment or your perspective equipment to have an a la carte technology that would work?

Let us start with Ms. Sohn first and then come to you.

Ms. SOHN. I will have to admit I don't have a very detailed analysis. I would be more than happy to provide it to the Task Force.

I will give you an example. I am an XM subscriber and I don't listen to the talk. Occasionally I take in a Met game. I am a huge Mets fan. But I would rather just pay for the music. That is what I listen to.

At a bare minimum, I know there are issues around providing individual channels. That, obviously, is a consumer advocate's dream, that you could basically pick and choose. And I would like to hear Mr. Karmazin's response as well.

But at a bare minimum, you should be able to pick tiers. You know, if I just want music, I should be able to pay for that and pay less.

Mr. CANNON. I really love the idea of a la carte. I know the cable companies are not going to like that.

Ms. SOHN. So do I

Mr. CANNON. But at some point I would love to see that happen and with—

Ms. SOHN. It should happen in cable as well.

Mr. CANNON. Mr. Karmazin, could you talk about what the technological limits are on what you have. Would it be possible to go to a per channel a la carte?

Mr. KARMAZIN. I do not believe so, for lots of technical reasons. I don't want to use up all your time, but I am not trying to duck the question. I will be happy to spend time with it.

You know, there is no set-top box in your vehicle that has a radio in it. So the idea of being able to have a back channel to be able to tell that radio exactly which channels are there becomes problematic.

Mr. CANNON. So currently you probably can't do it. Could you do it with some tiers?

Mr. KARMAZIN. I think we can accomplish what I am hearing, which is today if you want to get a portion of our service, because you really like baseball or because you like the music, and I have heard both viewpoints, you have to buy \$12.95.

So what we have said is that we think that one of the benefits of this merger, because it does provide synergy—it will lose revenue. I mean, if we say that at the most for a Sirius subscriber, the most we will get is \$12.95, no scenario where we are raising that price, now what we are also saying is that we will provide the consumer with a choice to be able to get satellite radio for less than—

Mr. CANNON. But do you have the technology to do that? In other words, when the person buys the radio, would you limit the channels that it could receive at the time of sale? How would you do it?

Mr. KARMAZIN. We have the ability to do a—I am using what the witness talked about, call it tiers. We call it choices or bundles or something. We have the ability of offering a number of bundles.

But, remember, 43 cents a day, 130 channels, less than 10 cents a channel. Nobody has written a letter to their Congress person—and we have asked—we know that you have heard from your constituents on the high cost of their TV bills, their cable TV bill or their satellite bill. We haven't found one person who is saying that the \$12.95, or 43 cents a day, is too high in price.

What we are saying is, you know what, we will make it lower.

Mr. CANNON. I have a couple of other questions, one for Mr. Rehr.

This has been an awfully personal attack kind of hearing. I have been a little surprised. A little earlier you were accused of parsing your words and you seemed anxious to respond to that.

Do you recall? Mr. Cooper was talking about how you parsed your words? You can respond or not if you wish.

Mr. KARMAZIN. I mean, I do feel that way. Because, as I said, all we are asking for is to go through the regulatory process, right? I mean, we are not asking for anything. We are not sort of doing something wrong. We are American citizens, we are business people.

All we are asking for is if there is a Hart Scott Rodino filing that is due, we are going to make it. If there is an application to the FCC, we are going to do it, and we are going to vent this thing and people will have a choice.

But, you know, to sit there and tell me what my motives are, I mean, I just don't like hearing it. But I am a grownup, I can handle it.

Mr. CANNON. Mr. Rehr, let me just ask this. Mr. Boucher made the point that your being here, your presence is evidence that the satellite companies compete with broadcasters.

Is that a fair point that he made? He didn't ask for a response on that, but I would like one. Is that a fair point? And if you are here because it is competition, shouldn't that be taken into account as we look at what constitutes the market?

Mr. REHR. Yes. I think it is fair that we compete with a nationwide multi-channel audio programming company. I think in Salt Lake City, the Bonneville stations compete against satellite radio companies Sirius and XM.

However, as I talked about a little earlier when you were out of the room, Bonneville companies do not compete on a nationwide basis. So it is a little complicated, but it is really one directional competition as opposed to a market where you are constantly competing against each other on every aspect.

I hope that makes sense.

Mr. CANNON. I understand it.

Thank you, Mr. Chairman. I recognize my time is expired, and so I yield back what time I don't have.

Mr. CONYERS. Thank you so much.

We now turn to the gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman.

I am at a little bit of a loss. I am pleased to hear all my senior Members get a chance to listen to all this radio. Because I am basically just on the phone talking to my constituents.

And I am a little—did you really pay \$80-million-something to Howard Stern?

Mr. KARMAZIN. Absolutely.

Mr. COHEN. That is rather obscene, isn't it?

Mr. KARMAZIN. Let me tell you, it is an awful lot of money. But if I were in terrestrial radio, where I spent a long time—

Mr. COHEN. You are in extraterrestrial radio?

Mr. KARMAZIN. I am in extraterrestrial radio.

Mr. COHEN. Yes. He is an extraterrestrial character, isn't he?

Mr. KARMAZIN. In my opinion, I would have paid him that same amount of money. And had their current company paid him that same amount of money, they would have made \$70 million on top of what they would have paid him based on their financial results since he left.

So the marketplace dictates how much money you pay the NFL and how much money you pay Major League Baseball and how much money you pay talent. And in the case of Howard Stern, he was paid what the market warranted, and we were fortunate enough to be the one that paid it to him.

Mr. COHEN. But you are basically competing with the folks at XM to hire these Howard Sterns, or whatever, because you all are bidding to get these big names to get people to subscribe to you.

Mr. KARMAZIN. No, I think, Congressman, I just said to you that we are competing with terrestrial radio, because who we hired Howard Stern from was a large radio company, not XM.

We are competing—because if Howard Stern were offered more money to go to work at Clear Channel or Infinity Broadcasting or CBS, I am convinced that Howard would go there. So, no, I totally disagree with you, sir.

And the idea of having—people go into their local market, whether it is Salt Lake City or wherever, and they listen to their radio. The idea of it is a national service, I mean, whether or not it is Rush Limbaugh, who is on in every market, you know, who is on 800 stations, or Sean Hannity, the idea that we are not competing with terrestrial radio is just not credible.

And as a matter of fact, just one point on that subject. If in fact what they are saying is true, that they don't compete with us, then every one of these public companies have lied to the SEC, because in every one of their filings to the SEC, under the regulatory portion where it says competition, it says they compete with satellite radio. And I don't believe these broadcasters, who are good broadcasters, would like to the SEC when they said that they compete with satellite radio.

Mr. COHEN. Do you compete at all? I mean, Mr. Stern gave you a headline for your station, star performer, and that maybe got you to get some subscribers, the people that were hooked on him, he was their jones, and you got him. And the only other person who would have had that attempt would have been Sirius. Don't you all compete for the NFL? I guess you don't compete for the XFL. Nobody does. But for the NFL?

Mr. KARMAZIN. Well, yes, we compete with terrestrial radio as well. So, I mean, as an example, right now, Rush Limbaugh is on terrestrial radio. One could argue, would we. The answer is we are not. I am not discussing it, not that it would be bad. All I am saying is that if we chose to hire Rush Limbaugh, we would be competing with terrestrial radio because he is on the 800 radio stations.

We are not competing with XM. The market is too small, sir. If we got all of their subscribers, if we got them all, okay, the market would still not be significant enough to pay for the fixed costs of operating the business. So the only business model that works is us to be able to get more subscribers. And the way you get more subscribers when you are dealing—particularly when you have the

money now available through some synergies, to be able to offer lower prices.

We are not looking to bankrupt our company and we are not going to do something that is going to bankrupt our company. We have too many shareholders, too many employees, and we are not going to do something that is stupid. And the idea of just saying, well, you have these high fixed costs, you know, you have these high fixed costs, lower your price.

We are saying no, we are not going to do that. But if there is a merger and there is savings created, we will give back a percentage of that savings to the consumer.

Mr. COHEN. Well, I wish you all a lot of luck. I don't know too much about this.

XM had a little party when they opened up on the Potomac River. And I went over there, my friend Warren Zevon hooked me up with some lady friend and we went over there and I bought a little—

Mr. COHEN. And I bought a tiny amount of stock and I sold it, too. So I am happy you all are doing well because it was my tax loss that year.

Mr. CONYERS. We now turn to the gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman.

I want to thank all of you for being here today and your patience. I wish we had time to listen to each one of you and ask you some questions, because you have got such good experience and insight.

But a lot of times when we are dealing with our constituents, we are talking to them at the McDonald's, Sunday school class somewhere, and they just have simple questions. And sometimes it gets frustrating.

I know I had, just trying to work through a phone conversation with one of your two companies, I won't say which one, I felt at the end of it like I just wanted to pick my phone up and throw it out the door.

And the question I would have that I think some of them are going to ask us is, if you merge these two companies, you have certain programs, XM has certain programs. Are you going to keep all those programs or are you going to cut some of them?

Mr. KARMAZIN. So, our vision of the way it would work is that if you are an XM subscriber, you have the Major League Baseball, you have whatever number of channels available to you now.

What we contemplate is that we would take some other content, and again we have to work with our content partners. But the hope would be that we would get NASCAR to agree to be on XM as well. We will get the NFL to agree to be on XM as well.

We currently have a deal with NPR and XM has a deal with somebody else that is not NPR that we would hope to offer.

So the radios are not obsolete, nothing lost. They get everything that they are getting now. They get the same channels that they currently are getting and we will use additional capacity that each company currently has to be able to share content.

And that is where we get to the more choice.

Mr. FORBES. So you wouldn't envision cutting any of the existing programming that you have now?

Mr. KARMAZIN. We think that that would result in disappointing the consumer. We are charging them \$12.95. If in fact we disappoint them, that sounds to me like we are going to get less subscribers, not more, and that is not the purpose of wanting to do the merger.

Mr. FORBES. Now, the vehicles that, you know, we have some on car lots that are XM, some Sirius right now in their radios. How would it work that they would continue to be able to use those radios? Would they have to do anything to change that? Would they continue to be able to use the same ones and still have the same programming options that either one would have?

Mr. KARMAZIN. Yes. And that is the argument that we have made and the conversations we have had with our OEM partners who make these car radios and that there are all these radios in the cars. And we certainly are not looking to disappoint the customer.

So if you have a Ford vehicle that has Sirius Satellite Radio in them, you will not have to do anything else, okay, after the deal—assuming the merger were approved. That if, in fact, the merge were approved, we would be able to provide them with more content through some of the XM content.

Mr. FORBES. And just the last two questions. As I know you can appreciate, if we tell our constituents they are going to get interoperability in their radios and then we say they have them, but they just can't afford them, they kind of scratch their head to that and say it doesn't do them any good.

And sometimes we make promises, even with good intentions, that we can't keep.

What is the enforcement mechanisms if we are wrong? What happens if the prices do go up? What happens if they have less choice? What are the enforcement teeth that stop that from happening, because we apparently haven't had a lot in some of these other problems.

Mr. KARMAZIN. And, again, what we are saying is that they have the radio currently so that it is not obsolete. So they get more choice coming out of that radio without having to buy a more expensive receiver.

What the mechanism is to make sure we live up to our promises, I will leave to the regulators. But I am willing to say we should be held accountable for everything I have said here and everything that I will say when we meet with regulators and we meet with people throughout this process.

This isn't "trust me." This is about we should be held accountable. And I have got to believe that within the infrastructure of the Government or however it is done, we should be able to be accountable.

Mr. FORBES. Mr. Chairman, I see my time is expired. I yield back the balance.

Mr. CONYERS. I thank the gentleman, and recognize the gentleman from New York, Mr. Anthony Weiner.

Mr. WEINER. Thank you, Mr. Chairman.

First of all, Mr. Karmazin, let me apologize on behalf of everyone for the many pronunciations of your name you have heard today.

But I do want to tell you on the subject of names, if you guys name this S&M Radio, I am off the reservation. I am just not signing up. [Laughter.]

Can I ask you just a couple of very brief foundations foundational questions?

Mr. Rehr, do your member stations compete with Mr. Karmazin's product?

Mr. REHR. They do, yes.

Mr. WEINER. All right. Do your member stations play music, have music on some of them?

Mr. REHR. Yes, 13,000 radio stations, yes.

Mr. WEINER. Mr. Karmazin, do some of your broadcast stations have music?

Mr. KARMAZIN. Yes, sir.

Mr. WEINER. Mr. Rehr, do some of your broadcasters have talk?

Mr. REHR. Yes.

Mr. WEINER. Mr. Karmazin, some of your stations have talk?

Mr. KARMAZIN. Yes, sir.

Mr. WEINER. Mr. Rehr, do some of your stations have sports?

Mr. REHR. Yes.

Mr. WEINER. Mr. Karmazin, do some of your stations have sports?

Mr. KARMAZIN. Yes.

Mr. WEINER. I would like to ask the panel to oblige me by stop throwing around the word "monopoly" when just about every explanation of competition has been stipulated to over and over again throughout this thing.

And while it might serve to send shivers into the spine of regulators, it doesn't have much effect if it has no foundation in the realities in the world today. In fact, it is hard to imagine how you can describe satellite being a monopoly when they have no ability to exercise monopoly power in any meaningful way.

Can they stop someone else from getting into the marketplace? First of all, what moron would want to get into that marketplace?

Do they have the ability to, in an unfettered way, raise prices? Well, in fact, the competition that they have, as you yourself said, is with your stations, who are charging zero dollars and zero cents, very often for the same or very, very, very similar products.

So this notion that we are having a hearing about monopoly power is wildly exaggerated, particularly when you leave out the one most fundamental thing. Nobody needs to have a radio. No one needs to have this product. And, in fact, increasingly, it is anachronistic.

You know, it was mentioned by somebody, I think Mr. Sensenbrenner, about how he doesn't want someone tinkering with their Internet while they are—well, frankly, he doesn't realize that 50 percent of all cars rolling off the production line have an mp3 jack. And 100 percent of all computers have access—that have access to the Internet, can download content in the form of podcasts that is just like the comedy that Mr. Keller likes to get, just like the controversial talk that some people like to get.

And I have to tell you, I am stunned by how many people have satellite radio in this room. I don't understand—I mean, God bless you, Mr. Karmazin, I hope you are successful, but I don't under-

stand. Increasingly, it is tougher and tougher for any radio to compete.

Here is the things that I think we do need to learn. We made a mistake in the Echostar-DirecTV question. Mr. Rehr used it as an example. I think today satellite TV production and the competition that was supposed to come by keeping them apart has suffered.

The gentleman, Mr. Cooper, has talked about how he were right then. You know what? Maybe if we had let those two merge back in 2002, we would have that promised broadband access going through the satellite that we thought we were going to have. We don't have it.

You know, sometimes mergers serve to help an industry and help choice move forward. And I have to tell you, if this notion that concentration is bad—Mr. Rehr, do you believe the concentration is inherently bad? Take a look at Clear Channel. Take a look at the number of communities that have less choice in terrestrial radio.

Arguably, if you want to compete with Mr. Karmazin and win, you should be as much against concentration among your members as you appear to be on this panel. This is a new world we are living in. No longer is it can we be sanguine to say that, well, we don't have anything that when people get together, because consumers wind up doing worse.

Mr. Martin at the FCC, you know, raised a pretty high bar in one of his several, often disjointed comments about this. He said at one point, "We would need to demonstrate consumers would clearly be better off with more choice and affordable prices."

And some people have said that is an impossible test to pass. Well, in fact, you are going to have more choices, I think, because when you get into your car, you are going to have one player that is going to have football and baseball, where otherwise you would have to put another radio on top of it to be able to get both of those things. And you have got to include that in your discussion about whether prices are going to come down, Mr. Cooper.

If you are now going to have one player that is going to be able to play both services, consumers are paying less. And I will go one step further. The innovation that is going to then be promoted by people being able to make hardware, invest all of the R&D hardware to come up with a better player, think, the players—and again, Mr. Karmazin, I apologize, are not so great. I think they still need a good deal.

But people have to make a choice between developing one for XM and developing one for Sirius. Now I think the prices are going to come down on the players because you are going to have those things.

So we have to stop with the 1970's version of this discussion. And if Mr. Rehr admits that this is competition, the fact that he is fighting so hard on this means this is going to be more competition, which means this should probably be approved.

Does anyone want to comment on any of that?

Mr. COOPER. I would be glad to comment on that.

Mr. CONYERS. The gentleman's time is expired.

Mr. WEINER. Can I at least get an answer, Mr. Chairman? Thank you.

Mr. COOPER. I will be glad to comment, because I actually disagree with almost everything you have said.

Because satellite radio, we have heard it in Mr. Boucher's numbers, 32 hours a week of radio listening. The world has changed—32 hours a week. TV is about 56 hours a week. The world hasn't changed so much.

But Mr. Boucher and Mr. Smith give you an exact answer to what they do that is different than what local radio does.

What Mr. Karmazin does is he aggregates small demand. Ms. Waters's question as well. He aggregates small demand that the local market will not support.

So the Sixties channels disappear in D.C. because there aren't enough Sixties listeners in D.C., but Mr. Karmazin takes the listeners in D.C. and the listeners in San Francisco, aggregates them and can sell them.

The Boston Red Sox—I am from the Bronx so I use the Boston Red Sox as an example. There are lots of Boston Red Sox fans spread all over the country. But the local TV station cannot deliver a station to those viewers or listeners because there is not enough of them in their little market.

Nationwide there is enough of them so that Mr. Karmazin can sell the New York Yankees in Boston and San Francisco, because he has aggregated the market.

And oh, by the way, he also happens to sell the San Francisco Giants to the Boston Red Sox. So Karmazin competes with local, but local can't compete with national. That is what Mr. Rehr has said. And that is 32 hours. So these are compliments, not substitutes.

Mr. WEINER. But would you agree that that is not true? Your example is not 100 percent not true as it relates to Britney Spears, is that correct? One hundred percent not true?

Mr. COOPER. Britney Spears, people like Britney Spears. She doesn't have a channel. Maybe she could have a channel. He will pay for all kinds much weird stuff. We have agreed on that. And he will pay a lot. So maybe he will give Britney Spears a channel.

The local radio station can't do that because they don't aggregate demand. So what Mr. Karmazin does is he meets a specific need. He sells mobility. Whether it is people who move more than 25 miles or content that moves more than 25 miles, the mobility is what he has because he is able to aggregate markets.

Mr. CONYERS. Mr. Cooper, Mr. Weiner's time has expired.

Mr. WEINER. Mr. Chairman—

Mr. CONYERS. We thank you so very, very much.

We now turn to Mr. Issa, the gentleman from California.

Mr. ISSA. Thank you, Mr. Chairman.

The extension of remarks was most interesting, and I appreciate hearing it.

First of all, and I don't want answers until we are at the end and the red light is on, because that works better.

First of all, perhaps what this body should have done is said that, Mr. Karmazin, that you could not enter, nor could XM, have entered into any exclusives until there was a viable combined market. Thus we wouldn't have had—you know, you wouldn't have had the shock jock that gave you all the business. One of you wouldn't

have had one sports franchise, the other wouldn't have had the other sports franchise, and Gary Ackerman wouldn't have to have two radios, which is tough because they are each in separate cars.

But we didn't do that. So one thing I want to point out, because I am seeing some content people in the audience, but nobody here is a content person.

Isn't it true the content community loves what has happened? They love the bidding up, like two sports franchises, to insane amounts, the cost of the content that you are supplying, which is part of the reason that you are not profitable. You guys have gotten in a bidding war, you have created a lot of money, each of you. You know, I don't care whether it is NF or hockey or whatever. All of these things have cost you a lot.

And that would go away to a certain extent in a merger, because people would have to choose whether or not to be on the global stage or not, so your cost of content might go down in renewals because you would have a certain greater relationship. And you would be much more similar to the terrestrial broadcasters who say, you know, I would really like to have this sports franchise, but it is only worth so much to me. And they, in fact, pay less.

That is a what-if. And, Mel, before I let anyone answer, I want to pose one more thing because I have looked at the technology, the bandwidth you have, the bandwidth the satellite, the TV satellite providers have.

Why is it that we are not looking here and saying, what if Clear Channel is able to take its national footprint of terrestrial stations, going digital, and decide instead of to be hi-def, to be at your resolution and in fact put 10, 12, 15, 20 channels into their existing bandwidth? What if this Committee said that we were going to let them do that, we were going to create that market?

Obviously Energy and Commerce, Mr. Dingell, would have a little to say about it. But what if we did that?

What if, in fact, we allowed for the 802.11 protocol to include a non-encrypted side so that there would be broadcast capability coming out of all those various 802.11s that are basically at any given time you can see hundreds of them on your screen if you have a decent high-gain antenna.

What if we in fact took satellite radio's 802.11 and Clear Channel and, by the way, let us not forget public broadcasting, which has an overlapping national footprint. What if we gave all of them the ability? Wouldn't we in fact have plenty of competition that would be direct competition?

The last what if that I have to ask is, what if we tell you that we reserve the right at any time to sell a whole new watt of bandwidth in the public interest that is exactly equal to what you and XM both have?

Mel, what about those what ifs?

Mr. KARMAZIN. So, I want to make sure I got them all.

Let us take the what if on the content provider. So, if you were to talk to any of the content providers, they will tell you that not only do they have a terrestrial radio deal, that they also have an Internet deal. They also have a cell phone deal. So there is no shortage of competition if there was no satellite deal.

And I am particularly interested in your comment about 802.11 and things like that. So, virtually all of the cars that are being made are being made with Bluetooth capability so that if you are interested in NASCAR, that you are able to get NASCAR from the local broadcaster who wants it. They certainly have local radio rights. They also have a deal with cell phone companies to where you could put that Bluetooth and get it through your audio spear.

And again, I think the idea that there is so much technology that is out there, that the idea is that these content is available through all of these choices and how much money a company is going to pay for content is whether or not the consumer is going to want that and whether you are going to get subscribers.

So why did we pay a lot of money for our content, is because we believe that we could get more subscribers if we offered the consumer more choice.

And regarding there being additional competitors, I am not a hypocrite, okay. I am saying that there is a lot of competitors. If the Government were to say that they wanted to have more—and by the way, they have more because they have authorized this HD radio. So what you are finding is that—and I am not rapping on Clear Channel. They have done an awful lot of good things and I have friends that are there. But where every single channel exists, they are going to be able to have three or four channels.

So there is going to be more choice and there are 1,100 radio stations on the air today. As a matter of fact, Clear Channel is providing a lot of the programming for these high-definition channels that are national channels.

So, I am sort of pretty cool to compete. I mean, I am open for that. And if the technology is there, there should be choices.

Mr. ISSA. Mr. Chairman, the only last what if would be, what if we allowed for further syndication of broadcasters so as to create, if you will, overt competition, which doesn't exist today. I mean, basically non-Clear Channel, nonpublic broadcasting, some of these have a difficult time coming together to form a national footprint. What if we, in fact, made sure that was available?

Thank you.

Mr. CONYERS. That would be the subject of yet another hearing.

Mr. ISSA. I yield back.

Mr. CONYERS. Thank the gentleman.

Let me first of all express my real and sincere commendations to all of the five witnesses. You have started a discussion that I am sure is going to raise a number of questions which will be coming to you for you to submit answers for the record. We will give you a week for our Members to do that. Then there will be another week to print up the record.

And I want to thank you all.

I can't help but particularly thanking Mel Karmazin for the tremendous cooperation that he has given the Committee and the way that he has handled himself and the comments that have exchanged between us all.

And I would like to also thank the guests, our spectators who came here, people who are—I see a lot of industry people around. We had an overflow first hearing, and we are going to be watching

carefully as the Senate rolls out its discussion. And the next year will be an exciting one as this subject develops.

On behalf of the Committee, my great thanks of indebtedness to you all.

And I, at this point, conclude the hearing. Thank you all very much.

[Whereupon, at 5:21 p.m., the Task Force was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSE TO POST-HEARING QUESTIONS SUBMITTED BY THE HONORABLE JOHN CONYERS, JR. TO MEL KARMAZIN, CEO, SIRIUS SATELLITE RADIO

Question:

Much of the criticism of this merger proposal has focused on its monopoly character. However, there is also the monopsony issue—the reduction from two to one in the number of buyers of content, including college sports rights, for satellite radio distribution. Today college conferences and other content providers can entertain offers from two different satellite radio distributors. Competition for content between these two companies has been fierce. If the proposed merger is allowed, all of that competition will disappear and there will be only one buyer of satellite radio content. Why should we allow that?

Answer:

It is highly inaccurate to describe this merger as creating a monopsony on the content side. There currently exist many distributors of content, and these distributors can reach listeners through a variety of platforms including terrestrial radio, wireless networks, podcasts, and the Internet. A programmer's options for content distribution are not currently limited to satellite radio, nor will they be so limited after the merger. Moreover, given satellite radio's continued desire to attract subscribers from other media, its incentive to continue to offer a broad range of content that customers desire will remain strong, and its ability to expand that range of programming will grow over time. In short, this merger does not harm competition at the programming level.

The specific example of college sports demonstrates that content providers do not rely on the two satellite operators to distribute their service. Like professional sports programming, college sports content is distributed successfully on a global basis via the Internet, in addition to traditional radio and television distribution. Using the Internet, a university, a conference, or an entire league, can distribute its content through a variety of partners or by itself. For example, Yahoo Sports distributes the audio broadcasts for over forty Division I schools across all sports, including teams from every Division I-A conference.¹ CSTV.com offers audio and video for over 100 top schools, including UNC, Notre Dame, and UCLA across 30 sports.²

Universities can also offer their content through their own websites. Many individual schools offer their audio broadcasts through their Internet sites, so that alumni who are geographically dispersed across the world can access content. For example, Michigan offers free game audio through its website.³ Even schools with smaller sports programs such as Cornell and Harvard offer their alumni access to game audio across a greater variety of sports than is possible over satellite radio.⁴ These are just a few examples and such offerings of content on university websites is becoming the rule rather than the exception.

Because satellite radio is competing against other platforms like terrestrial radio and the Internet, it will continue to have the incentives to gather the programming that current and potential subscribers want, so programmers with compelling content will continue to have access to satellite radio post-merger. Indeed, in the long-term, by enabling the consolidation of duplicative channels and freeing up capacity

¹ <http://media.yahoo.com/ncaa/splash.html>

² www.cstv.com

³ <http://www.mgoblue.com/section—display.cfm?section—id=185&top=2&level=2>.

⁴ <http://cornellbigred.cstv.com/> and <https://www.nmnathletics.com/SportSelect.dbml?DB—OEM—ID=9000&KEY=&SPID=3659&SPSID=41065>

for new channels, this merger increases the ability of programmers to reach customers via satellite radio.

If content owners have sufficient options to distribute their content, which they do, the focus of the antitrust inquiry should be on the impact on subscribers. For subscribers, there will be an immediate benefit as the most popular content can be shared on both the XM and Sirius platforms. Greater access to programming is a cognizable antitrust benefit.

